88-239 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 8, 1988

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QUESTIONS PRESENTED

1. Whether a federally-employed shipyard worker has any cause of action against a vessel owner when he is injured on board the vessel during the course of his employment.

2. Whether the government's immunity to suit by one of its own employees under the Federal Employees' Compensation Act is a relevant "circumstance" barring a third-party claim for contribution or noncontractual indemnity under the Federal Tort Claims Act's requirement that the United States be held liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

3. Whether a third party seeking contribution or noncontractual indemnity for injury to a federally-employed shipyard worker caused by negligence of a vessel owned by the United States has a cause of action against the United States under the FTCA.

PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains the names of all parties.

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Petitioner Eagle-Picher Industries, Inc. ("Eagle-Picher"),[1] requests certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 846 F.2d 888, and it appears as Appendix A. The

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[1] Eagle-Picher is a publicly-held corporation. It has no parent company, affiliates, or subsidiaries required to be listed by Rule 28.1 of the Court's Rules.

district court's opinion in this case is reported at 657 F. Supp. 803, and it appears, along with related orders, as Appendix B. The Judgment of the Court of Appeals is unreported and it appears as Appendix C. The district court's opinion in a predecessor case that was the basis for this action, *Colombo v. Johns-Manville Corp.*, is reported at 601 F. Supp. 1119 (E.D. Pa. 1984). It appears as Appendix D.

JURISDICTION

The decision and judgment of the Court of Appeals were filed on May 10, 1988. (A., pp. 1a, 48a). The time for filing this petition expires on August 8, 1988. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT,

> 33 U.S.C. §§ 903(b), 905(b) (1982 & Supp. III 1985):
>
> 33 U.S.C. § 903:
>
> (b) Governmental Officers and Employees
>
> No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.
>
> 33 U.S.C. § 905(b) (1982) (*prior to 1984 amendment*):

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

FEDERAL TORT CLAIMS ACT,

28 U.S.C. §§ 1346(b), 2674 (1982):

28 U.S.C. § 1346:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary

injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

FEDERAL EMPLOYEES COMPENSATION ACT, 5 U.S.C. § 8116(c) (1982):

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmens' compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT OF THE CASE

This case presents important federal questions that involve interpretation of broad-ranging statutes affecting the substantive rights of millions of citizens. The action below was decided on the United States' motion to dismiss for failure to state a claim under Rule 12(b), Fed. R. Civ. P. Therefore, all issues presented for review are pure legal issues turning on

the facts as alleged in the complaint.[2] These are as follows:

Charles Press was employed by the United States Navy at the Philadelphia Naval Shipyard ("PNS") from 1941 to 1943 and again from 1945 to 1979. Throughout the course of his 38-year employment at PNS, Mr. Press regularly worked aboard naval and merchant vessels owned by the United States; and throughout the period of his employment at PNS, Mr. Press was regularly exposed to unsafe concentrations of airborne asbestos dust aboard the government-owned vessels on which he worked. Although he was not informed of his condition until 1977, Mr. Press was first diagnosed by government doctors as suffering from asbestos-related lung impairment in 1973. (A., pp. 100a-04a, 106a).

The United States, as Mr. Press' employer and as the owner of the vessels on which he worked, had exclusive control over the workplace and the occupational health and safety conditions governing Mr. Press' working environment aboard its vessels. Beginning in the early 1930's and continuing into the 1970's, the United States specifically required, by contract and regulation, that thermal insulation products used aboard government-owned naval and merchant vessels contain significant amounts of asbestos. During that time period, the United States had significant and continually expanding knowledge of the health hazards associated with exposure to asbestos. (A., pp. 96a-103a).

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[2] Indeed, the Court of Appeals found that "the parties agree on the basic facts." (A., p. 5a).

In 1979, Mr. Press and his wife brought suit against petitioner herein, Eagle-Picher, and 21 other former manufacturers, sellers, and distributors of asbestos-containing products to which Mr. Press had or may have been exposed in the course of his PNS employment. Mr. Press died in 1983, and his wife pursued the suit.

In 1984, Eagle-Picher and seven other defendants were held jointly and severally liable to Mrs. Press in the amount of $575,000.00. Eagle-Picher thereafter settled all claims against it for $67,824.40. In total, Eagle-Picher incurred $69,356.31 in legal expenses, costs and disbursements in defending and settling the *Press* case. (A., p. 94a).

On February 6, 1985, Eagle-Picher presented to the appropriate federal agencies an administrative claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2672, 2675(a). Eagle-Picher demanded payment for losses incurred in the defense and settlement of Mr. Press' claim. Eagle-Picher alleged that it was entitled to contribution and/or noncontractual indemnification from the United States because Mr. Press' injuries were proximately and solely caused by the wrongful and negligent acts and omissions of the federal government and its agencies, officers, and employees. (A., pp. 104a-109a).

The United States failed to make final disposition of Eagle-Picher's administrative claim within six months after its submission, and Eagle-Picher thereafter deemed that failure to constitute final denial of its claim, pursuant to 28 U.S.C. § 2675(a).

On August 20, 1985, Eagle-Picher filed its complaint against the United States in the instant case.

Following a scheduling conference with Judge Pollak on January 16, 1986, at which the effect of the district court's prior ruling on a Rule 12(b) motion on essentially identical allegations in *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119 (E.D. Pa. 1984) (attached as Appendix D to this petition), was discussed, Eagle-Picher filed an amended complaint limited to its third-party claim for contribution or indemnity against the United States as a vessel owner. (Appendix E). Eagle-Picher alleged jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 2674 (1982), or in the alternative under the general admiralty and maritime law of the United States.

The United States subsequently moved for dismissal of Eagle-Picher's claim under Rule 12(b), Fed. R. Civ. P., arguing that the court should revisit its earlier *Colombo* decision in light of two intervening decisions of the First Circuit, *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986), and *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986). In the alternative, the government requested that, should the court deny its motion to dismiss and uphold the validity of Eagle-Picher's third-party vessel-owner claim, it certify the controlling questions of law for interlocutory appeal.

After a thorough review, analysis, and discussion of the First Circuit decisions, as well as of the government's arguments, the district court denied the government's motion to dismiss and upheld the validity of Eagle-Picher's claim against the government. *Eagle-Picher Industries, Inc. v. United States*, 657 F. Supp. 803 (E.D. Pa. 1987) (Appendix B). The court

held that Eagle-Picher stated a valid third-party FTCA claim pursuant to Section 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b) (1982). The court thereupon certified for interlocutory appeal the two questions which it deemed to be the controlling issues of law governing its decision. *See* Order of May 27, 1987. (A., pp. 19a-21a).

The United States Court of Appeals for the Third Circuit granted the United States' application for permission to appeal the certified questions. However, the Court of Appeals did not answer either of the two questions certified to it for interlocutory appeal. Instead, the Court of Appeals reversed the district court's order on a ground not certified for interlocutory appeal and not even argued by the United States. The Court of Appeals ruled that, because federal employees such as Mr. Press are exempted from coverage for workers' compensation purposes under Section 903(b) of the LHWCA, 33 U.S.C. § 903(b), federal maritime employees have no rights of action against a negligent vessel-owner under Section 905(b) of the LHWCA (or, by necessary implication, under any other source of substantive rights, such as common law). (A., pp. 10a-15a). Therefore, the court held, Eagle-Picher's third-party claim under the FTCA is also barred because applicable state law does not allow third-party contribution or noncontractual indemnification in the absence of common liability, even if there is common fault. (A., pp. 7a,15a). The Court of Appeals further ruled that Eagle-Picher's third-party claim against the United States did not satisfy the test for admiralty jurisdiction because the underlying injury to Mr. Press, although it occurred on a vessel

while in navigable waters, did not bear "a significant relationship to traditional maritime activity," as required under *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

Thus the Court of Appeals reversed the district court, ordering it to grant the United States' Rule 12(b) motion to dismiss Eagle-Picher's claim against the United States. (Appendix C).

REASONS FOR GRANTING THE WRIT

The decision below has far-reaching consequences not only for Eagle-Picher and similarly situated third parties seeking to recover indemnity or contribution for injuries to federal employees caused by a vessel, but also for all federal employees engaged in maritime employment. The Third Circuit's underlying holding that a federal maritime employee is barred from asserting a claim against a vessel owner is the sole basis for its conclusion that Eagle-Picher may not assert a third-party claim against a vessel owner. However, a presumably unintended but necessary consequence of the Third Circuit's underlying holding is that *all* federal maritime employees—whether longshoremen, Customs officials, Panama Canal Zone employees or shipyard employees of any kind—are cut off from asserting any federal rights of action against a vessel owner. The Third Circuit's holding would effectively make federal employees the *only* class of maritime workers in the United States without any federal rights of action against negligent shipowners, and it would do so in the absence of any justification in law or policy for such discriminatory treatment.

The underlying holding of the Court of Appeals does not in any way depend on the *United States'* status as the vessel-owner or as the defendant in this particular case. It would apply regardless of the identity of the vessel owner. It depends, instead, only on *Mr. Press'* status as a federal employee:

> Accordingly, although § 905(b) would permit a *private* longshore worker to sue an employer/shipowner for negligence this liability does not extend to the United States by virtue of the LHWCA's exclusion of *federal* employees from its coverage. Since Eagle-Picher's third party suit is based on § 905(b), we hold as a matter of law that its action is barred.

A., pp. 15a (fn. omitted, emphasis added).[3]

The Third Circuit's decision is directly at odds with decisions of the Ninth and Fifth Circuits, both of which have held that federal employees retain rights of action against a vessel owner either for negligence under Section 905(b) of the LHWCA (Ninth Circuit) or for the strict liability remedy of unseaworthiness under *Seas Shipping v. Sieracki*, 328 U.S. 85 (1946) (Fifth Circuit). *See* pp. 20-23, *infra*.

And at least three other federal district courts have agreed with Judge Pollak's analysis and conclusion at the district court level in this case that Eagle-Picher (or a similarly situated party) stated a viable claim

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[3] Indeed, the Court of Appeals expressly declined to rest its holding on any immunity peculiar to the United States *qua* Mr. Press' employer, as was urged by the United States. (A., pp. 4a, 11a & n.8).

for third-party contribution or indemnity against the United States as a shipowner notwithstanding the injured shipyard worker's status as a federal employee. *In re All [Hawaii] Asbestos Cases*, 603 F. Supp. 599 (D. Hawaii 1984); *In re All Maine Asbestos Litigation (PNS Cases)*, 589 F. Supp. 1571, 1576 (D. Me. 1984), *vacated and remanded on other grounds*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986); *Johns-Manville Sales Corp. v. United States*, 622 F. Supp. 443 (N.D. Cal. 1985). Indeed, in the *Hawaii* case, the court dismissed the entire basis of the Third Circuit's decision here in a footnote at the outset of its analysis:

> The FTCA provides that the United States will only be liable as if a 'private person.' Therefore provisions of workers' compensation statutes, such as § 903(a)(2) of the LHWCA, which exclude coverage of federal employees, are inapplicable in the analysis.

603 F. Supp. at 603, n.4.[4]

With respect to Eagle-Picher and to other third parties similarly situated, moreover, the Third Circuit's holding raises important questions as to the applicability and interpretation of the Federal Tort Claims Act. The Act renders the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The Third Circuit interpreted this instruction to mean that the United States can be subject to liability under the FTCA only where a

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[4] Section 903(a)(2) of the LHWCA was redesignated as Section 903(b) by amendment in 1984. Pub. L. No. 98-426, § 3(a), 98 Stat. 1639, 1640 (1984).

private individual in the same *legal* circumstances as the United States—one who happens to share the same special immunities or defenses peculiar to the United States—would be liable. Instead of looking to the closest analogous private individual in the same *factual* circumstances, such as a private shipyard employer/vessel owner, the Court looked to a nonexistent fictitious employer/vessel-owner who shared one and only one legal "circumstance" with the United States—its complete immunity to suit by one of its own employees. In this respect, the court's approach is inconsistent with Ninth Circuit precedent and with *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). *See* pp. 26-28, *infra*.

The question of the proper application of the FTCA has enormous significance for all potential claimants—especially third-party claimants—and also has sharply divided the lower courts. *Compare, e.g., In re All* [*Hawaii*] *Asbestos Cases, supra*, 603 F. Supp. 599, *Johns-Manville, supra*, 622 F. Supp. 443, *In re All Maine Asbestos Litigation, supra*, 589 F. Supp. 1571, *with Lopez v. Johns-Manville*, 649 F. Supp. 149 (W.D. Wash. 1986), *appeal pending*, No. 87-1543 (Fed. Cir. docketed Aug. 21, 1987). Moreover, it is a question that is bound to recur repeatedly until resolved by this Court.

The Court of Appeals' holding, therefore, raises important federal issues on which the lower courts have significantly divided and which also have important practical consequences for a huge class of potential claimants as well as for third parties claiming contribution/indemnification for injuries to such claimants. The decision has enormous practical significance for Eagle-Picher and similarly situated former man-

ufacturers of asbestos-containing products who are laboring today under a crushing liability burden for which the United States has thus far completely evaded responsibility—despite ample evidence of its fault, negligence, and culpability—because of its specialized and often hyper-technical legal defenses. And, as is more fully set out below, the Court of Appeals' decision also involves important questions of interpretation and application of major federal statutes that govern the rights of millions of Americans: the Federal Tort Claims Act, the Longshore and Harbor Workers' Compensation Act, and the Federal Employees Compensation Act.

1. The Court Should Review the Third Circuit's Determination That Federal Employees Injured by a Vessel Have No Cause of Action Against the Vessel Because That Ruling:

(a) Deprives Federally-Employed Maritime Workers of Any Federal Cause of Action Against a Vessel;

In arriving at its ultimate determination that the district court's denial of the United States' motion to dismiss Eagle-Picher's claims under Rule 12(b) should be reversed, the Third Circuit relied on the following steps in its analysis:

> (1) Mr. Press had no cause of action against the United States as a vessel owner because, as a federal employee, he was not covered by the compensation provisions of the LHWCA, which also guarantees a statutory right of action for negligence of a vessel in Section 905(b);
>
> (2) if Mr. Press had no cause of action against the United States as a vessel owner, then Eagle-Picher could have no

cause of action for contribution or indemnity unless governing state law allowed contribution or indemnity in the absence of common liability;

(3) governing state law did not allow contribution or indemnity in the absence of common liability;

(4) therefore, Eagle-Picher had no right of action for contribution or indemnity against the United States as a vessel owner.

The Third Circuit's analysis was not at all dependent on any unique status or attributes of the *United States* as the vessel owner.[5] Instead, it was entirely dependent on the unique status and attributes of *Mr. Press* as a federal employee. Nor did it matter, for purposes of the Court's reasoning and holding, whether Mr. Press was excluded from bringing a direct action against his employer, the United States, by the exclusive liability provision of the Federal Employees Compensation Act ("FECA"), 5 U.S.C. § 8116(c). For purposes of the Third Circuit's analysis and conclusion—dependent entirely on Mr. Press' status as a federal employee excluded from LHWCA coverage by Section 903(b) of that statute—the only relevant fact was Mr. Press' employment by the fed-

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[5] Nor could it be. It is well established that the United States is subject to suit under Section 905(b). *E.g., Lawson v. United States*, 605 F.2d 448 (9th Cir. 1979), where a maritime employee recovered a judgment for injuries received aboard a United States aircraft carrier. *See also Bueno v. United States*, 687 F.2d 318 (9th Cir. 1982).

eral government. Neither his coverage by the FECA nor the identity of the vessel owner mattered.

If allowed to stand, the Third Circuit's holding would have the sweeping consequence of cutting off *all* federal employees from their right to be compensated for maritime torts caused by the negligence—and also, by necessary implication, by the unseaworthiness[6]—of a vessel. Thus, if the negligence of a vessel coming into port caused injury to dockside maritime employees, some of whom were federal employees and some of whom were private employees, under the Third Circuit's rationale only those injured workers who were privately employed would have a federal cause of action. Similarly, a federal Panama Canal Zone worker injured by a dangerous condition aboard a private freighter would have no recourse against the vessel owner, although a privately-employed longshoreman would. A federal Customs inspector who falls through a negligently open hatch while inspecting a ship's cargo could not sue the vessel owner, although a privately employed watchman or longshoreman could.

(b) Contravenes Congressional Intent *Not* To Preclude Federal Employees from Bringing Negligence Actions Against Vessel Owners Under Section 905(b);

Federal law requires a vessel owner (i) to maintain his ship in a reasonably safe condition; (ii) to avoid exposing persons aboard the ship to hazards presented by areas or equipment within the control of the vessel owner; and (iii) to warn persons aboard

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[6] See pp. 21-22, infra.

the ship of any hidden dangers of which the vessel owner is aware. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 163 n.10, 165-67 and n.13 (1981). Here, Eagle-Picher alleged that the United States violated all these duties owed to Mr. Press under federal common law. (A., p. 107a).

Section 905(b) of the LHWCA, before it was amended in 1984—and it was uncontested that this case is governed by the pre-1984 version, since the amendment applied prospectively only[7]—provided that:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or breach thereof at the time the injury occurred.

33 U.S.C. § 905(b) (1982); *see* Pub. L. No. 92-576, § 18(a), 86 Stat. 1251, 1263 (1972). This Court has held the § 905(b) remedy to be available to an injured maritime employee even where the vessel owner was *also* the injured worker's employer, notwithstanding any exclusive liability provisions of applicable workers' compensation laws to the contrary. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Thus, if Mr. Press had been a shipyard worker in a privately-owned shipyard, there would be no dispute

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[7] A., pp. 74a-75a. Mr. Press' injuries and Eagle-Picher's cause of action arose well before the 1984 amendment became effective.

that he would have had a cause of action against a vessel-owner *even where the vessel-owner was also his employer. Jones & Laughlin v. Pfeifer* interpreted the Congressional intent of the 1972 amendments to the LHWCA adding Section 905(b) expressly to authorize such dual-capacity claims. 462 U.S. at 530-32. Therefore, Eagle-Picher argued below, and the district court held, that Eagle-Picher stated a viable third-party claim under the FTCA, which requires that the United States be held liable for tort claims to the same extent as a "private individual under like circumstances." 28 U.S.C. § 2674.[8]

The Third Circuit, however, sidestepped both Judge Pollak's analysis and the competing analyses of both litigants on appeal, and placed its entire reliance on Section 903(b) of the LHWCA, which provides in relevant part:

> (b) governmental officers and employees
>
> No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

As the Third Circuit admitted, this exclusion of federal employees from the scope of the LHWCA's coverage long predated the addition of the Section 905(b) vessel-owner cause of action in the 1972 LHWCA amendments. (A., p. 13a). Moreover, that exclusion

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[8] The Federal Employees Compensation Act's exclusivity provision—5 U.S.C. § 8116(c)—does not affect the rights of third-party claimants such as Eagle-Picher. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). See pp. 24, 27, *infra*.

was based entirely on the fact that an alternative compensation scheme already existed for federal employees under the FECA; the exclusion could not have been meant to deny federal employees the same rights of action for negligence that other maritime employees enjoyed. The 1927 exclusion reflected the LHWCA's primary purpose as a source of uniform and fair compensation to maritime workers injured during the course of their maritime employment. The primary purpose of the 1972 amendments, on the other hand, was to restrict the availability of common-law unseaworthiness remedies under the *Sieracki*[9] doctrine and to replace them with a statutory negligence cause of action for all maritime employees. (A., p. 14a); *see generally Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-65 (1977).

Although the Court of Appeals conceded this weakness in its analysis, (A., p. 13a), it nonetheless incorrectly concluded that, because Congress "radically changed the scheme of things" by amending the LHWCA in 1972 to eliminate *Sieracki*-type unseaworthiness claims and replacing them by § 905(b) negligence claims, and by eliminating other provisions of the LHWCA as well without disturbing or revising the provision excluding federal workers from eligibility for compensation, such federal workers were disabled from bringing § 905(b) vessel-owner actions, or even—by necessary implication—the *Sieracki*-type claims available under common law prior to the 1972 amendments.

The Third Circuit cited no authority either in the legislative history of the LHWCA or from other Cir-

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[9] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

cuits for its conclusion that federal workers have no § 905(b) or other rights against a vessel. Indeed, it failed even to cite or consider substantial authority to the contrary from other Circuits.

(c) Creates a Direct Conflict Between the Third, Ninth, and Fifth Circuits as to Remedies Available to Federally Employed Maritime Workers Injured by a Vessel in the Course of Their Employment.

In direct conflict with the Court of Appeals' decision below, the Ninth Circuit has held that a § 905(b) claim would be available to a federal maritime employee if he chose to assert it. In *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380, 1382 and n.2 (9th Cir. 1981), the court denied a federal employee's claim against a vessel-owner based on the *Sieracki* strict-liability unseaworthiness doctrine, holding that the 1972 LHWCA amendments were intended to replace *Sieracki*-type actions with § 905(b) negligence actions for all longshoremen, even federal employees exempted from the LHWCA's coverage for compensation purposes by § 903(a)(2).[10] The Ninth Circuit went out of its way to reassure the federal employee that, although he may have lost his strict-liability cause of action under the 1972 LHWCA amendments, he still retained rights to compensation, including specifically the § 905(b) right of action for vessel-owner negligence:

> This conclusion [that plaintiff has no cause of action for unseaworthiness] does not leave plaintiff without adequate remedy. . . . [H]e can still recover from defendant under the

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[10] As explained at n.4, supra, § 903(a)(2) was redesignated as § 903(b) in the 1984 LHWCA amendments.

> Longshoremen's Act upon a showing of negligence. 33 U.S.C. § 905(b).

643 F.2d at 1382, n.2.

Accordingly, the Third Circuit's conclusion that federal employees have no rights of action for negligence of a vessel under § 905(b) merely because they are not covered by the LHWCA's compensation provisions is directly contradicted by the Ninth Circuit.

The Third Circuit's decision is also in conflict with a well established line of authority in the Fifth Circuit holding that federal employees retain their *Sieracki*-type strict liability causes of action for unseaworthiness of the vessel despite the 1972 LHWCA amendments. The Third Circuit's ultimate determination that Eagle-Picher did not state a cause of action against the United States depended entirely on its intermediate holding that Mr. Press, as a federal employee, could not state a cause of action against a vessel-owner because he was not entitled to invoke Section 905(b) of the LHWCA.[11] If a federal employee like Mr. Press had any cause of action against a vessel owner, however, then the common liability required to underpin Eagle-Picher's third-party cause of action would exist even if Mr. Press could not assert a Section 905(b) negligence claim against that vessel owner. Thus, by necessary implication, in holding that there

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[11] Even if this intermediate holding were correct, it could only support the court's ultimate determination that *Eagle-Picher* could not state a *third-party* cause of action in contribution/indemnity under applicable state law in the absence of common liability if there was indeed *no other* possible source of common liability; that is, only if Mr. Press could not have asserted *any* claim against a vessel-owner.

was no possibility for Eagle-Picher to assert a third-party cause of action because there was no possibility of common liability, the Court of Appeals held that a federal employee injured by a vessel had *no* rights of action against the vessel.

However, in *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981), the Fifth Circuit expressly held that federal employees retain their *Sieracki*-type unseaworthiness remedies against the vessel notwithstanding the 1972 LHWCA amendments. In an analysis that results in an outcome that is the mirror image of the Ninth Circuit's conclusions in *Normile*, and which contradicts the outcome of the Third Circuit's reasoning in this case, the Fifth Circuit held that the 1972 LHWCA amendments represented a compromise. In exchange for eliminating the vessel-owner's liability for unseaworthiness, Congress increased the compensation benefits received by longshore workers, extended the scope of eligibility for workers' compensation shoreward, and codified a limited right to recover against vessel owners for negligence. But *federal* shipyard workers like Mr. Press, according to *Aparicio*, did not receive the benefit of this bargain and thus should not be subject to the burdens imposed by it. Accordingly, the Fifth Circuit held that federal employees retain their *Sieracki*-type remedies in strict liability for unseaworthiness of the vessel. 643 F.2d at 1116.[12]

Therefore, the Third Circuit's holding in this case has created a three-way division among the Circuits.

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[12] The Fifth Circuit has repeatedly upheld *Aparicio*. *See Burks v. American River Transportation Co.*, 679 F.2d 69 (5th Cir. 1982); *Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112 (5th Cir.), *cert. denied*, 464 U.S. 821 (1983).

The Fifth Circuit has held that federal maritime employees have no § 905(b) rights against a vessel owner but retain *Sieracki*-type rights against the vessel owner; the Ninth Circuit has held that federal maritime employees have no *Sieracki*-type rights but retain § 905(b) rights; and now the Third Circuit has held that federal employees have *neither* Section 905(b) *nor Sieracki*-type rights. This is clearly the kind of division among the Circuits that requires Supreme Court review and resolution.

2. The Court Should Review the Third Circuit's Determination That Eagle-Picher Cannot State a Third-Party Claim in These Circumstances Because That Ruling Raises Important Federal Questions Concerning the Interaction and Interpretation of the FTCA, the LHWCA, the FECA, and State Workers' Compensation Acts, Creates Another Conflict With the Ninth Circuit as to Those Matters, and Is Inconsistent With This Court's Precedent.

Had the Third Circuit begun its analysis—as did the district court—with the Federal Tort Claims Act, the principal jurisdictional basis for Eagle-Picher's action, it would not have become entangled in a morass of confusion with respect to the rights of action peculiar to *federal* maritime employees at all. Properly analyzed, this case does not involve any issues peculiar to federal employees. Under the FTCA, the United States is liable in tort, with certain exceptions not here relevant, "in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674. Accordingly, as the district court correctly held, the United States—in its role here as public shipyard employer/vessel-owner—must be held liable "in the same manner and to the same extent" as a *private* shipyard employer/

vessel-owner. (A., p. 74a). Such a private entity would be subject to a Section 905(b) claim by one of its employees under federal law notwithstanding any state workmen's compensation statute's exclusivity provision to the contrary. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). And, since *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), established that the *federal* exclusive liability provision of the FECA—5 U.S.C. § 8116(c)—did not bar third-party claims, the district court correctly held that Eagle-Picher stated a valid third-party claim under the FTCA. (A., pp. 82a-83a, 87a).

By putting the cart before the horse, however, the Third Circuit reasoned that the "specific terms" of the LHWCA prevailed over the "general" terms of the FTCA: "Thus the LHWCA's exclusion of Federal employees from its coverage is an exception to the government's general waiver of sovereign immunity in the FTCA." (A., p. 12a). The Court of Appeals also approved—without resting its decision on—the government's argument that the United States' immunity to suit by its own employees under the FECA is a "significant circumstance" that would preclude the analogy to a private shipyard employer/vessel-owner who is *not* covered by the FECA. (A., p. 11a).

Eagle-Picher submits that both elements of the Court of Appeals' analysis are mistaken and misconceive the interaction of the FTCA, the LHWCA, and the FECA in several ways. Moreover, the court's misconceptions have significant adverse implications for *all* potential FTCA claimants, especially third-party claimants, create another conflict with the Ninth Circuit, and are inconsistent with this Court's holding in *Lockheed*.

The FTCA, as the jurisdictional statute and the underlying basis for Eagle-Picher's cause of action in this case, must provide the framework for the analysis. It is the "framing" statute for determination of the substantive rights of an analogous private party under the LHWCA or under any other applicable statute. Contrary to the characterization of the court below, there is no question of "specific" vs. "general" presented by the interaction of the FTCA and the LHWCA;[13] the FTCA defines the circumstances in which the United States has waived its sovereign immunity and the extent of that waiver, and the LHWCA ensures that maritime workers have certain substantive rights to compensation. The LHWCA does not extend the government's sovereign immunity in derogation of the FTCA's waiver of it; indeed, the LHWCA does not address the United States' immunity, sovereign or otherwise, at all. It merely addresses the compensation benefits and rights of action available to maritime employees. Thus, the "conflict" that the Court of Appeals found between what it characterized as the "specific" statute versus what it characterized as the "general" statute is a *false* conflict. There is no conflict at all between statutes that deal with entirely different matters.

The Court of Appeals' approval of the government's FECA-based argument is also unfounded. It is wrong

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[13] The FTCA's requirement that the United States' liability in tort be assessed by comparison to that of a *private* individual in like circumstances can only be read to mean a private individual in like *factual* circumstances; if it meant that the liability must be assessed by comparison to a nonexistent fictitious entity who shares one and only one circumstance with the government—its immunity—then the FTCA's requirement of comparison to a "private" individual would become meaningless.

for the reasons explained at pp. 13, 23-25 and n.13, *supra*, and it would have the practical consequence of obliterating the word "private" in the controlling provision of the FTCA, requiring the United States to be liable for tort claims "in the same manner and to the same extent as a *private* individual under like circumstances." 28 U.S.C. § 2674 (emphasis added).

The Court of Appeals' approval of the government's argument that the United States' immunity to suit by its own employees under the FECA is a "significant circumstance" under the FTCA and thus would bar a third-party claim conflicts with the Ninth Circuit's analysis in *LaBarge v. Mariposa County*, 798 F.2d 364 (9th Cir. 1986), *cert. denied*, ___U.S. ___, 107 S. Ct. 1889 (1987), and in *Bell Helicopter v. United States*, 833 F.2d 1375 (9th Cir. 1987). In both cases the Ninth Circuit held that, when—as here—a third party claims contribution under the FTCA for injury caused by the United States, that party's ability to recover depends on whether he could recover from an *analogous private* party subject to *state* workmen's compensation law, but *not* subject to the FECA.[14] The *LaBarge* court explained the meaning of the FTCA provisions involved as follows, in direct contradiction to the Court of Appeals' interpretation here:

> Both [FTCA] provisions direct the courts to analogize the government to a private actor

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[14] Although the result in both cases was to bar the third-party claim because of the applicable *state's* worker's compensation exclusive-liability provision, neither case involved the possibility of a dual-capacity suit under the LHWCA or under *Sieracki* principles, as does this case.

> in a similar situation and apply state law to determine amenability to suit and substantive liability.

798 F.2d at 366.[15] Had the Court of Appeals followed the Ninth Circuit's instruction to "analogize the government to a private actor in a similar situation," of course, it would have been forced to sustain the district court's denial of the government's motion to dismiss.

Finally, the Third Circuit's approach to the interaction of the FTCA, the LHWCA, and the FECA in this case is inconsistent with this Court's decision in *Lockheed*. In *Lockheed*, the Court held that a third party's right of action for contribution or indemnity for injury to a federal employee is not barred by the exclusive-liability provision of the FECA because the third party does not receive any benefit of the "bargain" between the employer and the employee afforded to both by the FECA. The Third Circuit's approach, however, would allow the government to achieve *in*directly what it failed to achieve directly in *Lockheed*: the government could always evade liability as a third-party defendant in an FTCA case involving injury to a government employee so long as the "circumstance" of its immunity to direct suit by one of its own employees is considered the only relevant "like" circumstance under the FTCA analysis. Since the federal government is *always* immune to suit by one of its own employees under 5 U.S.C. § 8116(c), if this immunity *is* a relevant circumstance for pur-

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[15] *See also Hunt v. United States*, 636 F.2d 580, 584-85 (D.C. Cir. 1980) (Under the FTCA, "the Government stands in the shoes of a private person in like circumstances.")

poses of the FTCA analysis, *Lockheed's* holding that a third party's claim is not barred by the FECA's exclusive-liability provision becomes meaningless.

CONCLUSION

For all the foregoing reasons, Eagle-Picher requests that the Court grant its petition.

Respectfully submitted,

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August 8, 1988

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 87-1361.

EAGLE-PICHER INDUSTRIES, INC.
v.
UNITED STATES OF AMERICA,
Appellant.

Argued Dec. 7, 1987.
Decided May 10, 1988

Joe G. Hollingsworth (argued), Spriggs, Bode & Hollingsworth, Washington, D.C., for appellee.

Robert N. Kelly (argued), Harold J. Engel, David S. Fishback, U.S. Dept. of Justice, Washington, D.C., for appellant.

Before GREENBERG, SCIRICA and HUNTER, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

This appeal presents three issues concerning the liability of the United States as a third party for asbestos-related injuries suffered by government shipyard workers. Specifically, we must address: (1) whether the United States is subject to third-party liability under the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 905(b) (1982); (2) if, in order to sue under § 905(b), a party must also satisfy the requirements for admiralty ju-

risdiction, *see Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); and (3) in the alternative, whether admiralty jurisdiction can provide an independent basis for subject matter jurisdiction, *i.e.,* did the underlying wrong bear a significant relationship to traditional maritime activity. *See id.* at 268, 93 S.Ct. at 504.

As is often the case when complex issues are presented for appellate review, we benefit from the efforts of other courts that have decided similar cases. Our task is simplified when we are able to draw on another jurist's thorough analysis, and when the process itself is used to examine and refine the dispositive legal issues. These principles are especially applicable here, where the district judge carefully adjudicated a plethora of issues concerning the liability of the United States to asbestos manufacturers sued by government shipyard workers.

Our inquiry requires examination of two decisions of the district court: *Eagle-Picher Indus., Inc. v. United States,* 657 F.Supp. 803 (E.D.Pa.1987), the subject of this action, and *Colombo v. Johns-Manville Corp.,* 601 F.Supp. 1119 (E.D.Pa.1984), which formed the basis for the decision in *Eagle-Picher.* In *Eagle-Picher,* the court denied the United States' motion to dismiss Eagle-Picher's, the asbestos manufacturer, suit for contribution. The court held: (1) it had jurisdiction under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 (1982), which would permit Eagle-Picher to maintain a third-party action for contribution against the United States under § 905(b) of the LHWCA; and (2) under the LHWCA, Eagle-Picher need not satisfy the general admiralty jurisdiction requirement that the underlying wrong had a significant relationship (*i.e.,* a nexus) to a traditional maritime activity. *Executive Jet Aviation v. City of Cleveland,* 409 U.S. at 268, 93 S.Ct. at 504. By declining to apply admiralty principles to an LHWCA claim, the court concluded that Eagle-Picher stated a claim under the LHWCA by demonstrating that the injured worker was

engaged in maritime employment pursuant to 33 U.S.C. § 902(3). *See Eagle-Picher,* 657 F.Supp. at 805-06, 811-14.

The district court's decision rested on a controlling question of law and because immediate appeal would "materially advance the ultimate termination of the litigation," *id.* at 814 (quoting 28 U.S.C. § 1292(b)), the court certified an interlocutory appeal. We granted the United States permission to appeal the following questions:

> 1. Whether the limitation on the liability of the United States contained in the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), precludes the assertion by Eagle-Picher of its claim against the United States for contribution/indemnity, given that the Eagle-Picher claim arises under 28 U.S.C. § 2674 which provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."
>
> 2. Whether (assuming Eagle-Picher's claim is not foreclosed by the answer to question 1) Eagle-Picher, in order to support its claim, must, in addition to establishing that Mr. Press was injured on navigable waters while "engaged in maritime employment," 33 U.S.C. § 902(3), make an independent showing that the wrong which befell Mr. Press bore "a significant relationship to traditional maritime activity." *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454 (1972).

Although our scope of review is generally governed by the legal questions in the district court's certification order, we may "consider all grounds that might require reversal of the order appealed from." *In re Data Access Systems Securities Litigation,* 843 F.2d 1537, 1539 (3d Cir.1988) (en banc) (citing *Merican, Inc., v. Caterpillar Tractor Co.,* 713 F.2d 958, 962 n. 7 (3d Cir.1983), *cert.*

denied, 465 U.S. 1024, 104 S.Ct. 1278, 79 L.Ed.2d 682 (1984); *Akerly v. Red Barn Sys., Inc.,* 551 F.2d 539, 543 (3d Cir.1977); *see also Simon v. G.D. Searle & Co.,* 816 F.2d 397, 400 (8th Cir.), *cert. denied,* ___U.S. ___, 108 S.Ct. 268, 98 L.Ed.2d 225 (1987). With respect to the first question, we conclude that Eagle-Picher cannot assert its claim against the United States, and we will reverse the judgment of the district court. The primary basis for our holding, however, is a rationale other than that suggested by the district court in its certification order. Although we agree with the government that the United States' FECA immunity from suit is a significant circumstance that must be considered under the FTCA,[1] we hold that § 903(b)'s express exclusion of federal employees from the coverage of the LHWCA bars a direct LHWCA action by a federal employee against the government. As a result, the § 903(b) exclusion also bars Eagle-Picher's ensuing third-party action for contribution/indemnity.

By holding that Eagle-Picher's claim is foreclosed by our resolution of the first certified question, we obviate the need to decide the second question whether a § 905(b) cause of action must also satisfy the requirements for admiralty jurisdiction.[2] Eagle-Picher, however, suggests that regardless of the LHWCA's applicability, the district court could have exercised admiralty jurisdiction over this dispute.[3] Under admiralty jurisdiction, the underlying injury

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[1] *See infra* n. 8.

[2] We note only that the district court's holding, that § 905(b) of the LHWCA does not include the requirements of admiralty jurisdiction, conflicts with the First Circuit's treatment of the identical issue in *Drake v. Raymark Indus., Inc.,* 772 F.2d 1007, 1014 (1st Cir.1985), *cert. denied,* 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986), and the Fifth Circuit's holding in *Richendollar v. Diamond M Drilling Co., Inc.,* 819 F.2d 124, 125 (5th Cir.), *cert. denied,* ___U.S. ___, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987).

[3] *See* J.A. at 3 (amended complaint ¶ 3, alleging jurisdiction under the FTCA or in the alternative "general admiralty and maritime law

must bear "a significant relationship to traditional maritime activity," *i.e.*, have a nexus to maritime activity. *See Executive Jet*, 409 U.S. at 268, 93 S.Ct. at 504. We conclude, as has every court of appeals to address the issue, that injured shipyard asbestos workers fail to satisfy the *Executive Jet* nexus test.

I. FACTS

The parties agree on the basic facts. Between 1941 and 1979 Charles Press was employed by the United States Navy as a sheetmetal worker at the Philadelphia Naval Shipyard. During that time, Press was exposed to asbestos-based insulation products manufactured by Eagle-Picher and other firms. In 1979, Press and his wife filed suit in the Philadelphia Court of Common Pleas seeking damages from Eagle-Picher and twenty-one other manufacturers/distributors for injuries resulting from asbestos exposure. Press died in 1983 of asbestos-related injuries, and his wife pursued the 1979 suit. In 1984, she won a $575,000 verdict against Eagle-Picher and seven other defendants. Two months later Eagle-Picher settled its portion of the suit for nearly $68,000.

Eagle-Picher then sought contribution or indemnity from the United States. When the government took no action on the claim, Eagle-Picher filed suit in the district court, alleging jurisdiction under the FTCA, which renders the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674. Although Eagle-Picher asserted several grounds for recovery, the district court held that only one theory—a negligence action based

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of the United States. . . ."). In *Colombo v. Johns-Manville Corp.*, 601 F.Supp. 1119 (E.D.Pa.1984), the district court observed that it had subject-matter jurisdiction under either the FTCA or admiralty law. Although the court proceeded to analyze the dispute under the FTCA, it found it unnecessary, however, to elect between these two potential jurisdictional bases. *Id.* at 1132 n. 6.

on § 905(b) of LHWCA against the government in its capacity as shipowner, not as Press's employer—provided a viable basis for contribution. *Eagle-Picher,* 657 F.Supp. at 805 (citing *Colombo,* 601 F.Supp. at 1132-39).

The court determined that had the United States been a private shipowner in Pennsylvania, employees like Press working on one of its ships could bring a negligence action against the shipowner under § 905(b) of the LHWCA. This was possible, the court noted, even though the Pennsylvania Workmen's Compensation Act (PWCA) is the exclusive remedy against Pennsylvania employers. Because the exclusivity provision of the PWCA, Pa.Stat. Ann. tit. 77, § 481 (Purdon Supp.1987-88), conflicts with the LHWCA's authorization of suits against employers who are also shipowners, the district court concluded that the LHWCA preempted the PWCA. As a result, the court held, because both federal and state law permit contribution among actively negligent joint tortfeasors, Eagle-Picher could maintain a third-party suit against the United States under § 905(b) of the LHWCA. *See generally Eagle-Picher,* 657 F.Supp. at 805-06 (citing *Colombo,* 601 F.Supp. at 1132-39).

II. DISCUSSION

A. *Jurisdiction Under the LHWCA*

The United States attacks the district court's analysis at its inception. It contends that the court erred by failing to include the government's immunity under the FECA as one of the "like circumstances" that must be considered under the FTCA's "private individual/under like circumstances" standard. By including the FECA immunity, *see* 5 U.S.C. § 8116(c) (1982), in the FTCA formula, the government maintains it cannot be analogous to a private Pennsylvania shipowner because no private shipowner possesses federal immunity from direct suit by its employees. Therefore, the government argues, if it is immune from direct suit, it is necessarily immune from a third-party

suit. Eagle-Picher, meanwhile, contends that the government's argument is tautological: "[i]t argues that the FTCA waives the government's immunity in all cases except where the government is immune." Brief of Appellee at 17.

Under the FTCA, the government consents to suit "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Liability is determined by the law of the place where the wrong occurred—in this case, Pennsylvania. *See id.* § 1346(b).

If the United States is not subject to direct suit under § 905(b) of the LHWCA, Eagle-Picher cannot maintain this third-party suit. Indeed, Pennsylvania law, which applies here, bars third-party actions against tortfeasors who are not directly liable. *See Builders Supply Co. v. McCabe,* 366 Pa. 322, 325-28, 77 A.2d 368, 370-71 (1951); *Eckrich v. DiNardo,* 283 Pa.Super. 84, 88 n. 2, 423 A.2d 727, 729 n. 2 (1980).[4] Direct liability in this context stems from

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[4] In Pennsylvania, a right of indemnity "enures to a person, who without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable." *McCabe,* 366 Pa. at 325, 77 A.2d at 370. Thus, indemnity shifts the entire burden from one defendant to another, *see Svetz for Svetz v. Land Tool Co.,* 355 Pa.Super. 230, 242, 513 A.2d 403, 409 (1986), but only if the third party was primarily liable. *McCabe,* 366 Pa. at 326, 77 A.2d at 371.

Contribution, meanwhile, allows one defendant to force a concurrent or joint tortfeasor to "bear the common burden" by sharing damages. *McCabe,* 366 Pa. at 328, 336, 77 A.2d at 371, 375; *see* generally Svetz 355 Pa.Super. at 239, 513 A.2d at 407.

For purposes of this appeal, we need not determine which theory Eagle-Picher's claim implicates. We note only that like indemnity, the right to contribution is predicated on a third-party's direct liability to the

Congress's 1972 LHWCA amendments that permit longshore workers to not only collect workers' compensation from their employer, but to also recover from the shipowner for negligence. *See* § 905(b); *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 165, 101 S.Ct. 1614, 1621, 68 L.Ed.2d 1 (1981). This liability applies "even when the longshoreman is employed directly by the vessel owner." Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 530, 103 S.Ct. 2541, 2547, 76 L.Ed.2d 768 (1983). Hence, although a vessel owner that is also an employer is immune from suit in its capacity as an employer by virtue of the workers' compensation scheme, it is subject to suit for negligence in its "dual capacity" as vessel owner.[5] Third-party liability follows, the parties agree, because the exclusivity provision of the LHWCA, *see* § 905(a), would allow third-party suits as long as they would be permitted under the applicable substantive law (*i.e.,* Pennsylvania law). *See Lockheed Aircraft Corp. v. United States,*

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plaintiff.

Federal maritime law reaches the same result, allowing contribution among actively negligent joint tortfeasors. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106, 109-110, 94 S.Ct. 2174, 2176, 2177, 40 L.Ed.2d 694 (1974).

[5] In 1984, Congress amended the § 905(b) of LHWCA to prohibit suits against a shipowner that is also the plaintiff's employer. The amended language reads:

> If such person was employed to provide ship building, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charter) or against the employees of the employer.

33 U.S.C. § 905(b). This amendment applies only to injuries after September 28, 1984, and is therefore not controlling here.

460 U.S. 190, 196-98 & n. 8, 103 S.Ct. 1033, 1037-38 & n. 8, 74 L.Ed.2d 911 (1983).[6]

Under the government's theory, however, courts would never reach the point of applying the LHWCA. Instead, the government contends the FECA provides the exclusive remedy for its employees and thereby renders it immune from negligence actions that could otherwise be brought against private shipowners. Under § 8116(c) of the FECA, the government pays injured employees immediate, fixed benefits without regard to fault in exchange for employees accepting the FECA as their exclusive means of recovery. *See Lockheed,* 460 U.S. at 193-94, 103 S.Ct. at 1036-37. At least one court has adopted the government's theory that "to consider the Government as a private employer covered by the LHWCA would be to ignore the FECA as a significant aspect of the Government's circumstances." *Lopez v. Johns Manville,* 649 F.Supp. 149, 155 (W.D.Wash.1986).

The district court concluded that like any other shipyard employer in Pennsylvania, the United States, by virtue of the FTCA, would be subject to the PWCA, which provides that workers' compensation shall be the exclusive basis for liability against an employer.[7] *See Colombo,* 601 F.Supp.

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[6] In *Lockheed,* the Court interpreted the nearly identical exclusivity provision of the FECA, 5 U.S.C. § 8116(c), and observed that the statutory language was concerned only with the rights of employees, not the "rights of unrelated third parties." *Lockheed,* 460 U.S. at 196, 103 S.Ct. at 1038. Therefore, the Court concluded, the exclusivity provision did not bar actions such as those asserted by Eagle-Picher. The Court noted, however, that the viability of such third-party actions depended on the underlying substantive law. *Id.* at 197-98 & n. 8, 103 S.Ct. at 1038-39 & n. 8.

[7] The FECA also contains an exclusivity provision. 5 U.S.C. § 8116(c). The district court determined that the FECA did not bar the instant claims because in *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, 195-96, 103 S.Ct. 1033, 1037-38, 40 L.Ed.2d 911 (1983), the Court concluded that § 8116(c) was not intended to bar third-party actions.

at 1127-29. The court then determined, however, that § 905(b) of the LHWCA created an independent cause of action against shipyard owners. *Id.* at 1136. The exclusivity provision in Pennsylvania's workers' compensation law, the court observed, cannot "annul the remedy offered" in the LHWCA. *Id.* The court distinguished between shipyard owners and shipyard employers, concluding that workers' compensation immunity did not bar suits pursuant to § 905(b) against an employer in its capacity as owner. Accordingly, the court explained, the LHWCA's authorization of negligence suits against shipowners provided a federal right of recovery against shipowner/employers that is superior to an employer's state immunity from suit. *Cf. Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 724 n. 6, 100 S.Ct. 2432, 2438 n. 6, 65 L.Ed.2d 458 (1980) (state workers' compensation programs supplement federal LHWCA compensation, but if final state compensation award were less than an LHWCA award, federal law would preempt state law exclusivity provision); *Purnell v. Norned Shipping B.V.*, 804 F.2d 248, 250 n. ** (3d Cir.1986) (although state workers' compensation scheme may supplement federal benefits, it may not eliminate federal rights), *cert. denied*, ___U.S. ___, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987).

The difficulty with this reasoning is the assertion that § 905(b) of the LHWCA creates a cause of action for federal employees against the United States. To be sure, § 905(b) grants "a harbor worker the right to bring a

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See Colombo, 601 F.Supp. at 1126. Thus, the district court followed *Lockheed's* directive to examine the governing substantive law (Pennsylvania law) to determine whether a third-party could bring an indemnity/contribution against the United States.

The court did not, however, acknowledge that because of the FECA immunity, which is comparable to the PWCA immunity, "the United States should be entitled to the same immunity from suit enjoyed by private employer covered by state workers' compensation laws." *See LaBarge v. Mariposa County*, 798 F.2d 364, 367 (9th Cir.1986), *cert. denied*, ___U.S. ___, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987).

negligence action against his employer in its capacity as vessel owner." *Colombo,* 601 F.Supp. at 1136. The LHWCA, however, expressly excludes federal employees, such as the plaintiff, from its coverage. Section 903(b), which sets forth the scope of the LHWCA's coverage, states:

> *Coverage*
>
> . . .
>
> *(b) Governmental officers and employees*
>
> No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

33 U.S.C. § 903(b) (formerly § 903(a)(2)); *accord Lopez,* 649 F.Supp. at 155 ("LHWCA expressly excepts from coverage employees of the United States or any of its agencies"); *cf. In re All Maine Asbestos Litigation,* 772 F.2d 1023, 1029 (1st Cir.1985) ("[w]e doubt whether we can ignore an express congressional exclusion of federal workers from coverage under the LHWCA. . . ."), *cert. denied,* 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986). Thus, because we hold that § 905(b) of the LHWCA creates no right of action on behalf of federal employees against the United States, the FTCA waiver of immunity is not implicated.[8]

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[8] Nonetheless, we agree that our decision could have been based on the more indirect rationale advocated by the government. The FECA bars a direct action by a government employee against the government. 5 U.S.C. § 8116(c). Although the FECA does not directly bar this third-party suit, *see Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, 195-96, 103 S.Ct. 1033, 1037-38, 74 L.Ed.2d 911 (1983), the immunity it creates against suits by federal employees is a significant circumstance that we would have to consider under the FTCA, 28 U.S.C. § 2674. *See Lopez v. Johns-Manville,* 649 F.Supp. 149, 154 (W.D.Wash.1986).

The FECA immunity parallels the immunity provision of the PWCA,

Instead, we interpret the LHWCA in a manner consistent with Congress's express intent to extend LHWCA coverage only to private employees. Congress, in § 903(b), could not have been more explicit in denying coverage to government employees. Its decision to specifically exclude federal workers from the LHWCA overrides the FTCA's more general, and indeed indirect, reference to the government's LHWCA liability. "Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 323, 76 L.Ed.2d 704 (1932); *see also Busic v. United States*, 446 U.S. 398, 407, 100 S.Ct. 1747, 1753, 64 L.Ed.2d 381 (1980) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-90, 93 S.Ct. 1827, 1836, 36 L.Ed.2d 439 (1973)); *Creque v. Luis*, 803 F.2d 92, 95 (3d Cir.1986); *see generally* 2A N. Singer, *Sutherland Statutory Construction* § 51.05, at 499-500 (4th ed. 1984). Thus, the LHWCA's exclusion of federal employees from its coverage is an exception to the government's general waiver of sovereign immunity in the FTCA.

Any other construction of the LHWCA would subject the United States to liability for harm to its employees under a statute that from its inception has barred government employees from its coverage. *See In re Maine*

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and hence, would have to be considered in determining whether Pennsylvania would allow this type of third-party suit. A similarly situated private employer in Pennsylvania would be immune from direct liability and contribution actions. Accordingly, "[t]he United States, by virtue of its compliance with the applicable worker's compensation law, FECA, is entitled to claim the immunity. To hold otherwise would be to place the United States in a position less favorable than that of any private employer" under Pennsylvania law. *See General Elec. v. United States*, 813 F.2d 1273, 1276 (4th Cir.1987), *cert. granted and judgment vacated on other grounds*, ___U.S. ___, 108 S.Ct. 743, 98 L.Ed.2d 756 (1988); *LaBarge v. Mariposa County*, 798 F.2d 364, 367 (9th Cir.1986), *cert. denied*, ___U.S. ___, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987); *accord In re Maine Asbestos Litigation*, 772 F.2d 1023, 1027, 1029 (1st Cir.1985), *cert. denied*, 426 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986).

Asbestos Litigation, 772 F.2d at 1029; *Lopez*, 649 F.Supp. at 155. This express congressional exclusion of federal workers from LHWCA coverage precludes Eagle-Picher from using the FTCA to accomplish indirectly what federal employees could not accomplish directly.

We recognize, of course, that the LHWCA's § 903(b) exclusion of federal employees has been part of the statute since its enactment in 1927, *see Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 258 & n. 14, 97 S.Ct. 2348, 2354 & n. 14, 53 L.Ed.2d 320 (1977); H.R.Rep. No. 1767, 69th Cong.2d Sess. 2 (1927)--long before Congress codified the "dual capacity" shipowner negligence action in § 905(b). Thus, the § 903(b) exclusion could be viewed as encompassing only the workers' compensation aspect of the statute, not the subsequent statutory authorization of shipowner negligence suits.

Indeed, as originally enacted, the LHWCA was strictly a workers' compensation statute. Congress passed the LHWCA only after the Supreme Court held that states were powerless to extend their compensation laws to longshore workers injured "on the gangplank between a ship and a pier." *See Northeast Marine Terminal*, 432 U.S. at 257 & n. 12, 97 S.Ct. at 2354 & n. 12 (citing H.R.Rep. No. 639, 67th Cong., 2d Sess. 2 (1922)). As a result, Congress devised a federal compensation system to provide traditional workers' compensation benefits to longshore and harbor workers not covered by state compensation schemes. *Northeast Marine Terminal*, 432 U.S. at 257-58, 97 S.Ct. at 2353-2354. This rationale also explains the exclusion of federal employees, who were covered by "another appropriate and sufficient form of compensation" under the FECA and the Military Claims Act, 10 U.S.C. §§ 2731-37 (1982). *See* 1A *Benedict on Admiralty* § 30, at 2-62 to 2-63 (1987).

The Supreme Court expanded the remedies available to injured longshore workers in 1946 when it held that the

traditional seaman's action against a vessel owner for strict liability under the theory of "unseaworthiness" applied with equal force to longshore workers. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). As a result of this judicial expansion of the LHWCA, longshore workers could receive workers' compensation from their employer, and at the same time sue the vessel owner under a separate theory.[9]

In 1972, however, Congress "radically changed the scheme of things" by amending the LHWCA. *Scindia Steam Navigation Co.*, 451 U.S. at 165, 101 S.Ct. at 1621. Under the amendments, longshore workers were guaranteed increased compensation payments, but no longer possessed a right to recover in strict liability for unseaworthiness. In addition, Congress codified the employee's right to sue a vessel owner in negligence; abolished an employer's obligation to indemnify the vessel owner, and extended the LHWCA's coverage to land-based workers engaged in maritime employment. *See id.; Northeast Marine Terminal*, 432 U.S. at 261-65, 97 S.Ct. at 2356-57 (discussing legislative history); *see generally Director, OWCP v. Perini*, 459 U.S. 297, 299, 313, 103 S.Ct. 634, 637, 645, 74 L.Ed.2d 465 (1983) (discussing 1972 LHWCA amendments); *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490, 492 (3d Cir.1987).

At no point, however, did Congress address whether any of the LHWCA revisions should apply to federal employees. Significantly, although other exceptions from coverage were deleted, the exclusion of federal employees

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[9] Longshore workers, however, do not receive a double recovery. When an employer pays workers' compensation, it may then recover that amount from an employee who later collects damages from a negligence action against the shipowner. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530 n. 5, 103 S.Ct. 2541, 2547 n. 5, 76 L.Ed.2d 768 (1983) (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 269-70, 99 S.Ct. 2753, 2760-61 61 L.Ed.2d 521 (1979)).

emerged unscathed from the drastic congressional overhaul of the LHWCA. For example, while expanding the category of covered employees, and thereby extending the LHWCA's coverage shoreward, "Congress also removed the provision [in § 903] that precluded federal recovery if a state workmen's compensation remedy were available." *Northeast Marine Terminal*, 432 U.S. at 263 n. 21, 97 S.Ct. at 2357 n. 21; *see also Perini*, 459 U.S. at 314, 103 S.Ct. at 645. Thus, Congress not only broadened the category of employees covered by the statute, it did so by eliminating the exclusion in § 903(a) for employees eligible for state benefits, but not the § 903(a)(2) exclusion for federal employees.

Viewed in this context, the 1972 amendments establish that Congress specifically intended the United States's exclusion from liability under the LHWCA to remain as a bar to all aspects of the LHWCA. Accordingly, although § 905(b) would permit a private longshore worker to sue an employer/shipowner for negligence, this liability does not extend to the United States by virtue of the LHWCA's exclusion of federal employees from its coverage.[10] Since Eagle-Picher's third-party suit is based on § 905(b), we hold as a matter of law that its action is barred.

B. Admiralty Jurisdiction

Eagle-Picher nevertheless maintains that the district court should consider its undisputed allegations pursuant to admiralty jurisdiction. In addition to requiring that the injury occurred on navigable waters, admiralty jurisdiction demands that the wrong must "bear a significant relationship to traditional maritime activity." *Executive Jet*,

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[10] In any event, Congress's 1984 amendment of § 905(b) has now abolished the dual liability concept for private workers suing their employer/shipowner. *See* 33 U.S.C. § 905(b) (1984 Supp.). As of the effective date of the 1984 amendments, therefore, private employees are prohibited from initiating a negligence suit directly against a vessel owner.

409 U.S. at 268, 93 S.Ct. at 504; *see also Foremost Insur. Co. v. Richardson,* 457 U.S. 668, 674, 102 S.Ct. 2654, 2658, 73 L.Ed.2d 300 (1982). Thus, if the wrong "is only fortuitously and incidentally connected to navigable water," a court cannot assert admiralty jurisdiction. *Executive Jet,* 409 U.S. at 273, 93 S.Ct. at 507. For reasons that follow, we conclude that admiralty jurisdiction does not exist.

As a threshold matter, every court of appeals to address the issue—the First, Second, Fourth, Fifth, Sixth, Ninth, and Eleventh—has concluded that asbestos-related claims by land-based ship workers bear no significant relationship to traditional maritime activity. *See generally Petersen v. Chesapeake & Ohio Ry. Co.,* 784 F.2d 732, 736 (6th Cir.1986) (collecting cases). Courts addressing this issue most often examine four factors to determine whether an alleged tort bears a significant relationship to traditional maritime activity: (1) the function and role of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and nature of the injury suffered; and (4) traditional concepts of the role of maritime law. *Drake,* 772 F.2d at 1015-16; *Oman v. Johns-Manville Corp.,* 764 F.2d 224, 230 (4th Cir. 1985), *cert. denied,* 474 U.S. 970, 106 S.Ct. 351, 88 L.Ed.2d 319 (1985); *Myhran v. Johns-Manville Corp.,* 741 F.2d 1119, 1121 (9th Cir.1984); *Harville v. Johns-Manville Products Corp.,* 731 F.2d 775, 783-87 (11th Cir.1984).

We find this analysis not only compelling, but also required by our own jurisprudence. More than a decade ago, we adopted this four-part test "for determining whether torts occurring upon navigable waters have a maritime connection." *Edynak v. Atlantic Shipping Inc.,* 562 F.2d 215, 221 (3d Cir.1977) (citing *Kelly v. Smith,* 485 F.2d 520, 525 (5th Cir.1973), *cert. denied,* 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974)), *cert. denied,* 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). In *Edynak,* we held that an injury suffered by a longshore worker, serving as a signalman aboard a vessel while the vessel was being

unloaded, satisfied the maritime nexus test because the worker was performing a task relating to ship unloading—an activity long associated with admiralty law. *Id.*

Although it normally satisfies the threshold "situs" test for admiralty jurisdiction, a shipyard worker's claim based on an asbestos-related injury does not bear a sufficient connection to traditional maritime activity. First, the function and role of the parties does not require application of admiralty law. Although Press, the underlying plaintiff and injured worker, performed his duties on board ship, his skills were essentially land-based. Press performed sheetmetal work in close proximity to operations involving the removal of asbestos-containing insulation. On occasion, he was also required to remove asbestos from insulation-covered piping systems. *See* J.A. at 14 (amended complaint ¶ 30). His skill and training was "linked more with the land than with the sea." *Harville,* 731 F.2d at 785.[11] Thus, Press was not a harbor worker injured while performing the work of a seaman. *See Edynak,* 562 F.2d at 221.

Second, although Press worked on board ship, the "involvement of the ships is at most tangential to the nature" of his tort claim. *See Oman,* 764 F.2d at 231; *Myhran,* 741 F.2d at 1122. Many construction workers perform identical tasks in land-based buildings, and Press's claim would have been the same had he worked in a factory instead of on board ship at the Philadelphia Naval Yard.

Third, the causation and type of injury does not favor invocation of admiralty law. Press suffered respiratory

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[11] Arguably, the function and role of defendant asbestos manufacturers tend to support the assertion of admiralty jurisdiction. Defendants, although land-based, manufactured and marketed their products for use on vessels. Nevertheless, the products were not designed specifically for maritime use. *Oman v. Johns-Manville Corp.,* 764 F.2d 224, 230 (4th Cir.1985), *cert. denied,* 474 U.S. 970, 106 S.Ct. 351, 88 L.Ed.2d 319 (1985); *Harville,* 731 F.2d at 784. In any event, we do not find this aspect of the first factor dispositive.

tract injuries caused by exposure to asbestos-based insulation products. Land-based workers suffer the same injuries from identical causes; indeed, the injury and its cause "are far more closely affiliated with the clearly land-based negligence arising in the construction industry generally than with negligence taking place in commerce and navigation on the navigable waters." *Owens-Illinois, Inc. v. United States District Court,* 698 F.2d 967, 971 (9th Cir.1983) (per curiam).

Fourth, when viewed in light of the traditional concept of the role and purpose of admiralty law, Press's claim does not relate to traditional maritime activity. Admiralty law is "designed and molded to handle problems of vessels relegated to ply the waterways of the world . . .", such as navigational rules, maritime liens, seaworthiness, cargo damage, and maintenance and cure. *See Executive Jet,* 409 U.S. at 269-70, 93 S.Ct. at 505. None of these concepts support the view that admiralty law is concerned with asbestos-related injuries suffered by sheetmetal workers who happen to perform their jobs on vessels in a shipyard. *See Harville,* 731 F.2d at 785-86.

Accordingly, we conclude that the tort claims forming the basis for Eagle-Picher's cause of action did not bear a significant relationship to traditional maritime activity. The judgment of the district court will be reversed. The case will be remanded to the district court for entry of judgment for the United States.

No costs taxed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EAGLE-PICHER INDUSTRIES, INC.	:	CIVIL ACTION
	:	NO. 85-4846
v.	:	
	:	
UNITED STATES OF AMERICA	:	

ORDER

The predicate for this lawsuit was a lawsuit brought in the Philadelphia Court of Common Pleas in 1979 by Charles and Thelma Press against Eagle-Picher and numerous other manufacturers and distributors of asbestos products. The basis of that lawsuit was that Mr. Press, a civilian shipyard worker employed by the United States at the Philadelphia Naval Shipyard, had, over the course of approximately thirty years of work on United States' and other vessels, been exposed to, and contracted asbestos-induced disease from, asbestos products manufactured by Eagle-Picher and the other defendants. The suit continued after Mr. Press' death, Mrs. Press recovering a substantial verdict against Eagle-Picher and certain of the other defendants. Soon after the verdict, Eagle-Picher settled the claim against it for $67,824.40. Thereafter, pursuant to the procedure prescribed by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2675(a), Eagle-Picher filed a claim against the United States for contribution or indemnity in the amount of $69,356.31, a sum reflecting the actual settlement figure plus certain associated defense and settlement costs. When the Eagle-Picher claim was not satisfied at the administrative level, suit was filed under FTCA in this court.

The theory of the present lawsuit, as reflected in Eagle-Picher's amended complaint, is that (1) the United States

as a vessel-owner employer negligently caused asbestos-related injuries on the navigable waters of the United States to Mr. Press, a government employee who was at the time of the injury "engaged in maritime employment" within the meaning of the Longshoremen and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 902(3); hence (2) the United States, were it a private actor, would, pursuant to LHWCA, 33 U.S.C. § 905(b), have been liable as vessel-owner employer to Mr. Press; and hence (3) Eagle-Picher, having settled the Press claim against it for the same asbestos-related injuries, was entitled to seek contribution or indemnity from the United States.

Upon the filing of the amended complaint, the United States moved to dismiss, or, in the alternative, for certification of the controlling questions of law to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b).

On March 18, 1987, this court entered an Order denying the motion to dismiss and granting the motion for certification. An Opinion was filed concurrently with the Order. In the Opinion and Order, the parties were directed to submit a jointly prepared draft form of supplementary order framing the questions to be certified. The parties, unable to agree on a joint draft, submitted competing drafts. Thereafter the court undertook to prepare its own supplementary order:

In accordance with 28 U.S.C. § 1292(b), the court hereby CERTIFIES that it is of the opinion that its Order of March 18, 1987, considered in the context of its Opinion of the same date and its Opinion in *Colombo v. Johns-Manville Corp.*, 601 F. Supp. 1119 (E.D. Pa. 1984), involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal of the Order may materially advance the ultimate termination of this litigation. The controlling questions of law are:

1. whether the limitation on the liability of the United States contained in 5 U.S.C. § 8116(c) precludes the assertion by Eagle-Picher of its claim against the United States for contribution/ indemnity, given that the Eagle-Picher claim arises under 28 U.S.C. § 2674 which provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

2. whether (assuming Eagle-Picher's claim is not foreclosed by the answer to question 1) Eagle-Picher, in order to support its claim, must, in addition to establishing that Mr. Press was injured on navigable waters while "engaged in maritime employment," 33 U.S.C. § 902(3), make an independent showing that the wrong which befell Mr. Press bore "a significant relationship to traditional maritime activity." *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 268 (1972).

/s/J. H. Pollak
POLLAK, J

May 27, 1987

United States District Court,
E.D. Pennsylvania.

March 18, 1987.

Civ. A. No. 85-4846.

EAGLE-PICHER INDUSTRIES, INC.
v.
UNITED STATES OF AMERICA.

Joe G. Hollingsworth, Edward M. Fogarty, Gary I. Rubin, Washington, D.C., Barbara Pennell, Philadelphia, Pa., for plaintiff.

Richard K. Willard, Asst. Atty. Gen., Edward S.G. Dennis, Jr., U.S. Atty., J. Patrick Glynn, Director, Harold J. Engel, Deputy Director, Joseph B. Cox, Jr., Asst. Director, David S. Fishback, Trial Atty., Torts Branch, Civ. Div., Robert N. Kelly, Trial Atty., Torts Branch, Civ. Div., U.S. Dept. of Justice, Washington, D.C., for U.S.

LOUIS H. POLLAK, District Judge.

This is a suit against the United States brought by Eagle-Picher Industries, Inc., under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the United States has moved to dismiss for failure to state a claim on which relief can be granted. In the alternative—i.e., in the event that its Rule 12(b)(6) motion is denied—the United States asks that the governing legal questions be certified to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b). To clarify the issues tendered by these motions,

it will be helpful to describe the background of this litigation.[1]

I.

In 1979, Eagle-Picher and twenty-one other manufacturers and/or distributors of asbestos were sued by Charles and Thelma Press in the Philadelphia Court of Common Pleas. *Charles Press v. Johns-Manville Corp.*, No. 4802 (Case No. 8), Pennsylvania Court of Common Pleas, Philadelphia County, January Term, 1979. The gravamen of that law suit was that Mr. Press had been a civilian shipyard worker employed by the United States at the Philadelphia Naval Shipyard (hereinafter "PNS") to do sheetmetal work from 1941 to 1943, and from 1946 to 1979,[2] and that in the course of this employment he had been "exposed to asbestos in connection with the application, use, and removal" of asbestos-based insulation materials manufactured and distributed by the defendants. Amended Complaint, *Eagle-Picher Industries, Inc. v. United States of America*, (E.D.Pa., C.A. No. 85-4846) paragraph 11. In 1983, Mr. Press died of mesothelioma, asbestosis and respiratory failure. Mrs. Press continued to pursue her late husband's claim and her own consortium claim, and in February of 1984 she won an aggregate verdict of $575,000 against Eagle-Picher and six other defendants. Two months later, Eagle-Picher settled its portion of Mrs. Press' law suit for $67,824.40.

In February of 1985, Eagle-Picher sought contribution or indemnity from the United States. Following the procedural scenario prescribed by the Federal Tort Claims Act, 28 U.S.C. § 2675(a), Eagle-Picher first filed an ad-

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[1] The facts recited below are based on the allegations in Eagle-Picher's amended complaint, the pleading which is the target of the motion to dismiss; in addressing that motion, those allegations are taken to be true.

[2] From 1943-46 Mr. Press was in the Navy.

ministrative claim in the amount of $69,356.31, a sum reflecting the Press settlement figure plus certain costs connected with the defense and settlement processes. In the ensuing six months the United States took no dispositive action on Eagle-Picher's claim. Thereafter, on August 20, 1985, Eagle-Picher initiated suit in this court.

The complaint initially filed by Eagle-Picher advanced numerous theories of recovery in support of its claim that the United States was indebted to it for the sum spent to resolve the Press litigation. One of those theories—and only one—had, a year before, in a case much like the one at bar, been found to be a viable basis for a claim of contribution or indemnity against the United States. That analogous case—also on my docket—was *Colombo v. Johns-Manville Corp.*, 601 F.Supp. 1119 (E.D.Pa.1984). There, George Colombo, a government shipyard worker employed at PNS, sued Pittsburgh-Corning, an asbestos manufacturer, for injuries allegedly suffered as a result of his exposure to asbestos, some of which he claimed occurred on board vessels owned by the United States. Pittsburgh-Corning in turn impleaded the United States as a third-party defendant. The third-party claim sustained in *Colombo* rested on the Federal Tort Claims Act, which imposes tort liability on the United States whenever such liability would attach to "a private individual under like circumstances." 28 U.S.C. § 2674. I determined that, had the United States been a *private* Pennsylvania shipowner, covered by the Pennsylvania Workmen's Compensation Act (hereinafter "PWMCA"), and had Mr. Colombo been employed by that shipowner to work on one or more of its ships, Mr. Colombo could, pursuant to Section 5(b) of the Longshoreman and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 905(b),[3] have brought

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[3] 33 U.S.C. § 905(b), added to LHWCA in 1972, provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone

a negligence action against the shipowner.[4] I further determined, in *Colombo,* that Pittsburgh-Corning was substantively entitled to implead the United States, because

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otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 902(3) provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker. . . .

In 1984, § 905(b) was amended, but the amendment only applies to injuries subsequent to September 28, 1984, and hence has no bearing on this litigation or some hundreds of other cases of like chronology pending in numerous federal courts. The 1984 amendment to § 905(b) replaced the third-to-last sentence ("If such person . . .") with the following sentence:

> If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator,or charterer) or against the employees of the employer.

[4] This would have been so notwithstanding that the United States, were it a private entity, would, *qua* Mr. Colombo's employer, presumably also have been liable to Mr. Colombo for workmen's compensation benefits. With respect to the argument that a private employer, covered by PWMCA, would be protected by PWMCA's exclusivity provisions

"both Pennsylvania law and federal maritime law provide for contribution among joint tortfeasors, where both are actively negligent." 601 F.Supp. at 1139. And I rejected the argument advanced by the United States that a third-party plaintiff's substantive entitlement to implead an employer as joint tortfeasor is, as respects employers covered by LHWCA, barred by the exclusivity language in Section 5(a) of the Act, 33 U.S.C. § 905(a).[5] Because *Colombo* set-

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from an employee's negligence action, I held that the state statute's exclusivity provisions would be preempted by Section 5(b) of LHWCA for persons covered by the federal statute. For coverage under the federal statute, see note 3, *supra*.

[5] Section 5(a) provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

In holding that Section 5(a) does not address third-party claims, I followed Judge Gignoux's thoughtful analysis in *In re All Maine Asbestos Litigation (BIW Cases)*, 589 F.Supp. 1563, 1570-71 (D.Me.1984), which transposes to LHWCA the reasoning of the Supreme Court in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). In *Lockheed*, the court construed the virtually identical exclusivity provisions of the Federal Employees Compensation Act (hereinafter "FECA"), 5 U.S.C. § 8116(c), and concluded that those

tled, the Court of Appeals for the Third Circuit had no opportunity to review the correctness of this court's decision sustaining the legal sufficiency of Pittsburgh-Corning's third-party tort claim against the United States. The issues involved in *Colombo* have not been addressed by the Third Circuit in any other case.

In the instant case, subsequent to the filing of Eagle-Picher's multi-count complaint against the United States, a chambers conference was held. At that conference the parties agreed to pursue the following course of action: Eagle-Picher would file an amended complaint, confining its claim to the count modelled on the third-party tort claim sustained in *Colombo*. On the filing of the amended complaint, the United States would move (a) to dismiss for failure to state a legally cognizable claim, and (b), in the alternative, for certification of the question to the Third Circuit. The motion to dismiss was, in effect, to be a request that I reconsider my *Colombo* ruling in light of an interpretation of LHWCA presented in two supervening decisions of the First Circuit, *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir., 1985), *cert denied*, 476 U.S. ___, 106 S.Ct. 1994, 90 L.Ed. 2d 675 (1986) and *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir.1985), *cert. denied*, 476 U.S. ___, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986). To these decisions I now turn.

II.

A. *Drake v. Raymark Industries*

Drake was a case very like *Colombo*, except that the third-party defendant was a private entity. Mildred Drake,

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provisions did not bar petitioner's third-party indemnity action against the United States. The First Circuit, in *Drake v. Raymark Industries Inc.*, 772 F.2d 1007, 1020, 1022 (1st Cir.1985), *cert. denied*, ___U.S. ___, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986), appeared to regard *Lockheed* as offering little guidance with respect to LHWCA; with all respect, I continue to find *Lockheed* pertinent and compelling.

whose late husband, Forrest Drake, was a shipyard worker employed by Bath Iron Works (hereinafter "BIW"), brought a diversity products-liability action in the United States District Court in Maine against several manufacturers and distributors of asbestos products. The complaint alleged that Mr. Drake had contracted asbestos-related diseases from defendants' products while engaged in shipbuilding and ship-repair operations on vessels in the BIW shipyards. Raymark Industries and other defendants filed a multi-count third-party complaint against BIW in the *Drake* litigation, as well as in approximately fifty other cases.[6] In a series of opinions, Judge Gignoux dismissed all contribution/indemnity counts of the third-party complaint.[7] The count based on § 905(b) of LHWCA was found wanting because, so Judge Gignoux determined, "BIW was not during the relevant periods the owner *pro hac vice* of vessels being constructed or repaired in its yard. . . ."[8] The First Circuit affirmed all of Judge Gignoux's rulings, but did not adopt all of his reasoning: In sustaining dismissal of the § 905(b) count, the First Circuit blazed a trail longer and broader than Judge Gignoux's.

To understand the First Circuit's approach to the matter, it will be useful to refer briefly to the general structure of LHWCA. Complementing the Jones Act, which provides federal protection for seamen, the Longshoremen's and Harbor Workers' Compensation Act provides federal protection for land-phased maritime workers—i.e., all persons "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U.S.C. § 902(3). Most of the provisions of LHWCA comprise a work-

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[6] *See Drake*, 772 F.2d at 1009.

[7] For a summary of these rulings see *Drake*, 772 F.2d at 1010-11.

[8] *Bernier v. Johns-Manville Sales Corp.*, 547 F.Supp. 389, 390 (D.Me.1982), *quoted in Drake*, 772 F.2d at 1010-11.

men's compensation statute. However, § 905(b), added in the 1972 revision of the Act, establishes a statutory cause of action sounding in tort where the injury complained of is the result of negligence on the part of a "vessel":

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly. . . .[9]

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[9] The statutory conception of the "vessel" as defendant is traceable to the seaman's traditional entitlement to sue in admiralty for injuries caused by his ship's unseaworthiness. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), the Supreme Court extended unseaworthiness doctrine to protect not only crew members but also longshoremen injured as a result of the unseaworthiness of ships on which they were working. In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the Court held that a shipowner sued by a longshoreman for unseaworthiness could seek reimbursement from the longshoreman's employer where the latter created the unseaworthy condition by breaching its implied contractual commitment to the shipowner to stow cargo "in a reasonably safe manner"; and the shipowner's reimbursement claim was not barred by the facts that (1) before bringing his *Sieracki* claim, the longshoreman had recovered compensation from his employer's carrier pursuant to LHWCA and (2) Section 5 of LHWCA (then 33 U.S.C. § 905; now 33 U.S.C. § 905(a)) provided that an employer's compensation liability "shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ." In 1972, § 905(b) replaced the longshoreman's unseaworthiness claim ("essentially a species of liability without fault," 328 U.S. at 94, 66 S.Ct. at 877) with the statutory negligence claim whose proper contours are at issue in this case, and barred recovery by the shipowner against the plaintiff's employer. A 1984 amendment to § 905(b) precludes a § 905(b) suit where the shipowner is also the plaintiff's employer; however, as explained in note 3 *supra*, that amendment is controlling only with respect to injuries subsequent to September 28, 1984, and hence is without application to the present case.

The First Circuit, in describing the third-party claims brought by Raymark and the other *Drake* defendants against Bath Iron Works, characterized the central issue—and its resolution of that issue—in the following terms:

> Appellee BIW contends that defendants' § 905(b) action cannot be maintained because the injury allegedly caused by BIW's dereliction of duty as a shipowner *pro hac vice* was not a maritime tort, which is a fundamental requirement for an injury to be cognizable under § 905(b). The appellants respond by arguing that an independent basis for admiralty jurisdiction need not be shown to redress an injury under the section; all that is required is satisfaction of the literal words of the statute, which does not so much as mention the words "maritime tort" or "admiralty jurisdiction."
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> The question before us, then, is: does § 905(b) recognize only maritime torts, i.e., torts cognizable in admiralty (regardless of the actual basis of jurisdiction, such as diversity), or does its range encompass nonmaritime torts occurring on a vessel but where the tests for admiralty jurisdiction are not satisfied? After careful study, we think the scope of § 905(b) is limited to maritime torts.

772 F.2d at 1012.

In anchoring the issue in the concept of "maritime tort," the First Circuit expressly linked its analysis to its own prior decision in *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.1983), *cert. dismissed*, 463 U.S. 1247, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983), and to the Supreme Court's decision in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Because of their centrality to the *Drake* opinion, a brief summary of each of these cases may be helpful.

Executive Jet was a negligence action brought in admiralty by the owners of a jet airplane against the City

of Cleveland, the manager of Cleveland's municipal Burke Lakefront Airport, and an air traffic controller on duty at the airport at the time of the alleged negligence. The alleged negligence was failure to keep the airport free of, and/or failure to advise the plane crew of the presence of, seagulls whose inspiration into the jet engines on takeoff brought the plane to an immediate and abrupt halt in Lake Erie.[10] Justice Stewart, writing for a unanimous Court, affirmed the determinations of the district court and the Sixth Circuit that the district court lacked subject-matter jurisdiction. Admiralty jurisdiction over "aeronautical torts" is not established simply by the happening of a wrong "on or over navigable waters—whatever that means in an aviation context"; it is also necessary "that the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268, 93 S.Ct. at 504. ". . . [W]e hold that, in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." *Id.* at 274, 93 S.Ct. at 507 (footnote omitted).

Austin v. Unarco was a suit against several manufacturers and distributors of asbestos brought by the estate of a deceased Bath Iron Works employee who "worked on board ships berthed in the Kennebec River at BIW, both on new ships berthed in the river after launching and on older ships brought into BIW for repair. His primary job was to follow behind the pipecoverers, who applied asbestos insulation products to the ships' pipes, boilers and others machinery, and paint over the asbestos insulation. He was also responsible for sweeping up asbestos scraps left by the pipecovers." 705 F.2d at 3. The court rejected plaintiff's contention that the case should have been tried not as a diversity case but in admiralty, where Maine's contributory negligence defense would have had

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[10] Happily, there were no injuries; but the plane sank.

no application. "We acknowledge that . . . distinguishing between activities that are maritime and those that are not approaches medieval nicety. In this case, however, the conclusion that decedent's activity was not 'traditionally maritime' is indicated by a congeries of factors—the vessel, whether under construction or laid up for repairs, was passive and temporarily incapable of acting as such; the work being done was a major project involving specialized tools and skills, both in kind and in magnitude far beyond that traditionally done by a ship's crew; and the hazards exposed could not be said to be peculiar to maritime navigation. *Id.* at 14.

In *Drake,* having concluded that a § 905(b) cause of action must satisfy a set of requirements for admiralty jurisdiction independent of LHWCA's express statutory requirements, the First Circuit built on *Executive Jet* and *Unarco* to reason as follows:

> Because defendants' third-party § 905(b) action is predicated solely upon BIW's alleged dereliction of duty *qua* shipowner *pro hac vice* vis-a-vis its employee Drake, and not based upon any alleged duty running from BIW to defendants, the proper question is whether plaintiff Drake could have maintained a § 905(b) action against BIW for his injuries. Accordingly, we look to whether the injury forming the basis of Drake's primary action would be cognizable in admiralty, or have admiralty law applied to it.
>
> We consider our decision in *Austin v. Unarco* to have provided the channel markers for deciding that question. As we held there, to qualify as a maritime tort under *Executive Jet,* the wrong (1) must have occurred on navigable waters, *i.e.,* meet a situs or locality test, and (2) must have borne a significant relationship to a maritime activity, *i.e.,* meet a nexus test. *Austin v. Unarco,* 705 F.2d at 8-14. Thus, although we believe that it is necessary for the main-

tenance of a § 905(b) action that a party allege that a vessel's negligence was the source of the injury, such an incantation does not, as defendants contend, automatically result in the application of admiralty law.

Turning to the *Executive Jet* criteria, we first consider the situs requirement, *i.e.*, that the injury occur or take effect on navigable waters. As the Eleventh Circuit noted in *Harville* [*Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir.1984)], "when an injury is the result of a number of exposures, only some of which occurred in a maritime situs, and where the effects of the various exposures are indivisible," the question whether the situs test is met is raised. *Harville,* 731 F.2d at 782. That court concluded, in agreement with the Second, Fourth and Ninth Circuits, that the requirement was met "if the plaintiff has been exposed to asbestos on navigable waters regardless of whether he has also suffered exposures on land." *Id.* We see no reason to depart from the majority view on this question and we adopt it as our own. Thus, as in *Austin v. Unarco,* from our review of the record the situs requirement poses no problem to the characterization of Drake's injury as a maritime tort and "[t]he only issue, therefore, is whether the wrong bears a significant relationship to traditional maritime activity." *Austin v. Unarco,* 705 F.2d at 8-9; *see Executive Jet,* 409 U.S. at 261, 93 S.Ct. at 501.

Since our decision in *Unarco,* several other courts have considered *Executive Jet's* second requirement of a nexus to maritime activity in relation to asbestos injuries sustained by shipyard workers. All have reasoned to the same conclusion albeit using somewhat different markers en route. . . .

In *Unarco,* we focused on the nature of the decedent's job rather than the type of project—vessel construc-

> tion or repair—on which he worked. We concluded that the plaintiff was entitled to invoke admiralty only if the decedent was "injured while doing work traditionally done by members of the crew and thus, presumably, subject to many of the same hazards as seamen." 705 F.2d at 12. We ruled that because the decedent had been engaged in work "requiring special equipment and skills" not commonly found among the members of the ship's crew, admiralty law was not applicable to plaintiff's claims. *Id.* at 12-13. Other courts prior to the Eleventh Circuit's ruling in *Harville* focused on other criteria. The *Harville* Court, however, summarized and blended these various considerations, including our own, into a four-part test. . . . The criteria to be considered under this approach are the function and roles of the parties, the type of vehicles and instrumentalities involved, the causation and type of injury, and traditional concepts of the role of admiralty law. . . . Our conclusion, then, is that the injury sustained by Drake lacked sufficient connection to the traditional concerns of admiralty, and thus, neither plaintiff nor defendants can bring a § 905(b) negligence action against BIW *qua* shipowner *pro hac vice.*

772 F.2d at 1014-16 (footnotes omitted).

B. *In re All Maine Asbestos Litigation (PNS Cases)*

In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023 (1st Cir.1985), *cert. denied,* 476 U.S. ___, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986), was an aggregation of asbestos cases in which plaintiffs, or plaintiffs' decedents, were or had been shipyard workers employed by the United States on government vessels at the Portsmouth Naval Shipyards. Suits were brought against manufacturers and distributors of asbestos products utilized on the government vessels during the periods of employment. The defendants sought contribution/indemnity from the United

States. Judge Gignoux dismissed all third-party counts except the count based upon the United States' alleged breach of duties owed plaintiff in its capacity as shipowner.[11] *In re All Maine Asbestos Litigation,* 581 F.Supp. 963, 980-81 (D.Me.1984); *In re All Maine Asbestos Litigation (PNS Cases),* 589 F.Supp. 1571, 1576 (D.Me.1984). The viability of that count, predicated on the Federal Tort Claims Act, was certified to the First Circuit. The appellate court rejected the third-party plaintiffs' reliance on § 905(b) as a basis of tort liability. *Drake v. Raymark,* which had been decided by that court three weeks before, was found to be controlling:

> In *Drake* we held that defendant manufacturers' third-party claim against a private shipyard as owner *pro hac vice* would not lie under § 905(b) because that section countenances only maritime torts. *Drake v. Raymark Industries, Inc.,* at 1012. Since to qualify as a maritime tort the wrong must have borne some relationship to "traditional maritime activity," *Executive Jet Aviation v. Cleveland,* 409 U.S. 249, 261, 93 S.Ct. 493, 501, 34 L.Ed.2d 454 (1972), and the universal ruling of all circuits to have considered this type of wrong is that it does not bear such a relationship, *see Drake,* at 1015-16, no § 905(b) action could have been brought by plaintiffs against the owners of the ships on which they were doing construction or repair work. It follows that defendants have no contribution action under the section, either, since the only duties alleged to have been owed were owed to the employees, not the defendants. Accordingly, we rule that defendants' contribution and indemnity ac-

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[11] The First Circuit concluded that the district court's characterization of the surviving count, Count VI, as a claim for contribution or indemnification from the United States as *shipowner* was too narrow. The appellate court concluded that "Count VI on its face encompasses employer and shipyard owner theories" as well. *In re All Maine Asbestos Litigation (PNS Cases),* 772 F.2d at 1027.

> tion against the third-party defendant based upon § 905(b) must be dismissed for failure to state a claim on which relief can be granted.

772 F.2d at 1029-30.

C. *Was Colombo Wrongly Decided?*

If *All Maine Asbestos Litigation* was correctly decided, *Colombo* was wrong. Whether *All Maine Asbestos Litigation* was correct depends, in turn, on whether *Drake* was correct. I now consider that question.

Drake, as the opinion acknowledges, cannot be squared with the Fifth Circuit's opinion in *Hall v. Hvide Hull No. 3,* 746 F.2d 294 (5th Cir.1985). See *Drake,* 772 F.2d at 1017-19. *Hall* was a consolidation of three section 905(b) cases. In each, a shipyard worker was injured during ship construction. The common question of law was whether the ship work-sites—"floating hulls" which were at 75% to 90% of operational completion—had attained the status of "vessels" within the meaning of § 905(b). In determining whether its admiralty jurisdiction extended to the workers' § 905(b) claims, the Fifth Circuit pronounced itself "unable to accede to the argument of the defendants that, even though the hull might under the statutory intent of § *905(b)* be considered a 'vessel' against which a negligence action is recognized by § 905(b), nevertheless, federal admiralty *jurisdiction* would not extend to a § 905(b) action against such a vessel because a hull under shipbuilding construction bears no significant relationship to traditional maritime activity. We find no such distinction between a § 905(b) cause of action and admiralty jurisdiction to have been Congressionally intended by the enactment of § 905(b)." 746 F.2d at 300.[12]

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[12] *Hall* was written by the late Judge Albert Tate, Jr. Judge Tate was also the author of another important analysis of LHWCA, the *en banc* opinion in *Boudreaux v. American Work-over, Inc.,* 680 F.2d 1034

Hall, like *Drake,* concluded that § 905(b) did not extend beyond the reach of federal admiralty jurisdiction. *See Drake,* 772 F.2d at 1018. But, unlike *Drake, Hall* also concluded that admiralty jurisdiction over § 905(b) actions was established by Congress when it created the statutory tort remedy:

> For purposes of federal admiralty jurisdiction, maritime connexity (*Executive Jet's* requirement that the injury be in a "traditional maritime activity", was, in effect, Congressionally so determined through Congressional acceptance, in the 1972 revision of the Longshoreman's Act, of pre-1972 traditional judicial determinations of the maritime character of the activity involved in injuries to these amphibious workers.

Hall, 746 F.2d at 303.

Recently, in *May v. Transworld Drilling Co.,* 786 F.2d 1261 (1986), the Fifth Circuit has reasserted the connection between a § 905(b) action and admiralty jurisdiction but

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(5th Cir.1982), cited *infra,* note 17. These thoughtful and comprehensive opinions are characteristic of the exemplary judicial service performed by Judge Tate in over thirty years on the Louisiana Court of Appeals, the Louisiana Supreme Court and the Fifth Circuit. To the writer of this opinion, who had the good fortune of being a law school contemporary of Judge Tate four decades ago, *Hall* and *Boudreaux* aptly reflect the Judge's own perception of the proper judicial role, as recorded in the Memorial Resolution adopted by his colleagues at the 1986 Fifth Circuit Conference (798 F.2d XCI, XCII):

> He once summed up his philosophy of judging: a judge should render a technically sound opinion that fairly applies relevant authorities; reaches a humanly fair and socially useful result subject to the limitations of judicial review and the demands of consistency with legal doctrine; and . . . considers the implications of applying the rationale of the opinion to different factual situations that may appear in the future. In plainer words, he often asked: would this sound fair to a barber in Ville Platte?
>
> Who could ask for more in a judge? Who would settle for less?

found that, where an injury occurred on land and therefore did not satisfy the situs prong of *Executive Jet's* test of admiralty jurisdiction, the injured worker failed to state a cause of action under § 905(b):

> [W]e here explicitly hold that Sec. 905(b) permits only the assertion of a claim for a maritime tort. Only if a claimant first alleges facts comprising a maritime tort do we need inquire whether he has established the specific elements of a Sec. 905(b) cause of action.

786 F.2d at 1264.

While *May* and *Hall* agree that § 905(b) actions are encompassed by the admiralty jurisdiction of the federal courts, they appear to disagree about which analysis—the analysis of § 905(b) or of general admiralty jurisdiction—should guide the analysis of the other. In *May*, the Fifth Circuit applied the test articulated in *Executive Jet* to its analysis of the scope of § 905(b); and in *Hall*, it applied the statutory requirements of § 905(b), read together with its legislative history, to its analysis of the jurisdictional question.[13] The *May* approach leads to a narrower inter-

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[13] It may be noted that the *Hall* approach, applied to the facts of *May* (an injury occurring on land) might not change the result in *May* under the law of the Fifth Circuit. In *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (1976), *cert. denied*, 430 U.S. 906, 97 S.Ct. 1175, 51 L.Ed.2d 582 (1977)—a Fifth Circuit case subsequent to *Executive Jet* heavily relied on in *May*—the court held that Congress' 1972 landward extension of LHWCA ("an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building, a vessel)," 33 U.S.C. § 903(a)) applies only to compensation coverage, not to the new third-party tort remedy embodied in § 905(b). While the asserted distinction between the scope of compensation coverage and tort liability with respect to land-based injuries is not relevant in our case, the First Circuit in *Drake* suggested that the distinction between compensation coverage and tort liability justified its determination that Mr. Drake—who, like Mr. Press, was

pretation of § 905(b); the *Hall* approach leads to a broader interpretation of admiralty jurisdiction.[14]

To support its conclusion that both § 905(b) and admiralty jurisdiction extend to the cases before it, the Fifth Circuit in *Hall* relied on the Supreme Court's decision in *Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). The *Hall* court characterized the *Perini* ruling as follows:

> [T]he Supreme Court itself has held that the remedies of employees who are covered by the Longshoremen's Act and who are injured on navigable waters are not affected by *Executive Jet.* Thus, in effect, in injury to an Act-covered employee was considered to constitute a maritime tort prior to the 1972 amendments, then "the wrong [to him] bear[s] a significant relationship to traditional maritime activity," so as to meet this quoted "nexus" prong of the *Executive Jet* test for maritime-tort federal admiralty jurisdiction.

Hall, 746 F.2d at 302 (citations omitted). In *Hall,* the Fifth Circuit cited *Perini* for the proposition that the test articulated in *Executive Jet* does not so comprehensively define the scope of admiralty jurisdiction that all other sources of that definition, including the statutory language of § 905(b) and the legislative history that shaped it, have become irrelevant. An examination of *Perini* suggests that it may properly be read more broadly still.

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injured upon navigable waters—was not covered by § 905(b). As I will discuss below, the distinction on which the First Circuit relied is inapplicable to the issue presented in *Drake* and the case before me.

[14] The United States has advised this court of its understanding that the apparent doctrinal intracircuit conflict may be resolved *en banc* in *Richendollar v. Diamond M. Drilling Co.,* 784 F.2d 580 (5th Cir.1986), *rehearing en banc granted,* 790 F.2d 442 (1986). The "vessel owner" issue is also said to be pending before the Ninth Circuit in a large number of cases certified under 28 U.S.C. § 1292(b). See Letter of January 6, 1987 to the court from Robert N. Kelley, Esq., p.2.

Perini involved a workmen's compensation claim under LHWCA. Claimant Raymond Churchill worked for a construction firm, Perini North River Associates, which was building the foundation of a Manhattan sewage treatment plant projecting several hundred feet out into the Hudson River. The claimant was injured when standing on a cargo barge directing the unloading from a supply barge of heavy caissons (sections of pipe) which, filled with concrete, were to be anchored in the rock underlying the river bed; a line which held the caissons in place snapped and hit him. Compensation was denied by the Benefits Review Board, which in turn was affirmed by the Second Circuit, the court concluding that the claimant was not a person "engaged in maritime employment," within the meaning of 33 U.S.C. § 902(3), the section of LHWCA which describes the workers covered by the statute. The Supreme Court reversed.

The Court held in *Perini*, quite simply, that:

> when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3) [33 U.S.C. § 902(3)], and is covered under the LHWCA. . . . We consider these employees to be 'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.

459 U.S. at 324, 103 S.Ct. at 650 (footnote omitted). Although the Court paid considerable attention to the cases discussing admiralty jurisdiction that led to the enactment and subsequent amendment of LHWCA, it sought no interpretive guidance from cases discussing the jurisdictional issue wholly outside the context of LHWCA. Indeed, the Court was quite explicit in finding *Executive Jet* inapplicable to its interpretation of the scope of the Act.

> Perini cites our decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 [93 S.Ct. 493, 34 L.Ed.2d 454] (1972), and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on *Executive Jet* is misplaced. In that case, the only issue before the Court was whether federal admiralty jurisdiction extended to tort claims arising out of the crash of an airplane into navigable waters on a flight "within the continental United States, which [is] principally over land." *Id.*, at 266 [93 S.Ct. at 503]. Jurisdiction in *Executive Jet* was predicated on 28 U.S.C. § 1333(1), which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."
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> The explicit language of *Executive Jet* makes it clear that our discussion was occasioned by "the problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft" in a situation where "the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous." 409 U.S. at 265, 266 [93 S.Ct. at 503, 504]. Although the term "maritime" occurs both in 28 U.S.C. § 1333(1) and in § 2(3) of the Act, these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1050 (CA5 1982) (footnote omitted). In addition, Churchill, as a marine construction worker, was by no means "fortuitously" on the water when he was injured.

459 U.S. at 320 n. 29, 103 S.Ct. at 648 n. 29.

In *Perini*, the Court did not clearly establish whether it eschewed the jurisdictional analysis because it determined that the scope of LHWCA was not dependent on

the existence of admiralty jurisdiction (as the distinction it draws between the two uses of the word "maritime" suggests) or because it determined that the jurisdictional analysis was subsumed in its interpretation of LHWCA (as the observation that the claimant "was by no means 'fortuitously' on the water" suggests). Stated another way, *Perini* left unresolved the question whether, if called upon to determine whether a claim cognizable under LHWCA properly alleged federal admiralty jurisdiction, the Court would find its interpretation of the Act dispositive of the jurisdictional issue, or whether it would find that interpretation inconclusive and engage in an independent jurisdictional analysis.

What is clear that the Supreme Court held in *Perini* that when an injury occurs in the course of employment over navigable waters, as is alleged in Eagle-Picher's amended complaint, *see, e.g.*, paragraph 30, the injured worker satisfies the "maritime employment" requirement regardless of the specific nature of the worker's job or injury. Indeed, *Perini* expressly rejected respondent's contention that the "maritime employment" language required an "employee injured upon navigable waters . . . to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered." *Perini*, 459 U.S. at 318-19, 103 S.Ct. at 647-48.[15]

In pressing the argument that the Fifth Circuit, in *Hall*, misread LHWCA, the First Circuit, in *Drake*, distinguished the Supreme Court's opinion in *Perini* on the ground that

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[15] Even Justice Stevens' dissent in *Perini* assumes that employees satisfy the Section 2(3), 33 U.S.C. § 902(3), requirement of "maritime employment" where they fall within one of the "two important subcategories [of maritime employment], both of which are defined with reasonable clarity." *See Perini*, 459 U.S. at 327, 103 S.Ct. at 652 (Stevens, J., dissenting). One of those two subcategories, "any harborworker including a ship repairman, shipbuilder, and shipbreaker," seems to describe "with reasonable clarity" Mr. Press' employment.

it "was concerned solely with *compensation*, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct. . . ." 772 F.2d at 1018. But *Perini* is not so easily disposed of. In *Perini* the Supreme Court was interpreting the phrase "maritime employment" as used in the definition of "employee" appearing in Section 2(3) of LHWCA, 33 U.S.C. § 902(3). That definition applies both to the compensation provisions of the Act and to Section 5(b), 33 U.S.C. § 905(b)—the provision at issue in *Drake* and here—which provides for tort recovery for "a person covered under this chapter."

The history of another case arising in the waters off Manhattan makes plain that the Court does not endorse as narrow a reading of *Perini* as the one the First Circuit has articulated. That other case was a § 905(b) suit brought by Craig McCarthy, who was injured while painting the main-mast of defendant "The Bark Peking," a stationary museum ship owned by co-defendant South Street Seaport Museum. The district court granted summary judgment in favor of the defendants. The appeal reached the Second Circuit some months after that court in *Perini* had sustained the dismissal of Raymond Churchill's compensation claim. The Second Circuit affirmed the dismissal of Craig McCarthy's § 905(b) claim, holding that inasmuch as the museum ship "has not put to sea under her own power since the 1930's" and "[h]er present owners . . . do not intend to return her to active navigation," plaintiff's work did not constitute "maritime employment" within the meaning of LHWCA and hence plaintiff was outside the coverage of the Act. *McCarthy v. The Bark Peking*, 676 F.2d 42, 45 (2nd Cir.1982). McCarthy then petitioned for certiorari. Thirteen days after reversing the Second Circuit in *Perini*, the Supreme Court entered the following order:

> 82-53 *McCarthy v. Bark Peking.* The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consid-

> eration in light of *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Association.*[16]

After further briefing, the Second Circuit filed a new opinion which said, in pertinent part, the following:

> Having reconsidered our prior decision in the light of [*Perini*], as the Court has ordered us to do, we now hold that McCarthy was a covered employee for purposes of the LHWCA, and that the Bark Peking is a "vessel" to the extent that McCarthy properly may allege the "negligence of a vessel" and thus bring his action for damages under 33 U.S.C. § 905(b) (1976).
>
> We conclude that McCarthy now must be considered to have been engaged in "maritime employment" at the time he was injured on the Bark Peking on December 12, 1979. He was "injured on the actual navigable waters in the course of his employment on those waters. . . ." [*Perini*], 459 U.S. at 324 [103 S.Ct. at 650]. Under this latest Supreme Court decision, no more is required to qualify McCarthy as a statutory "employee."[17]

The Supreme Court denied certiorari.[18]

Injuries sustained by employees while engaged in "maritime employment" are cognizable under § 905(b). As Craig McCarthy was engaged in "maritime employment," so too were George Colombo and Forest Drake. So too was

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[16] *McCarthy v. The Bark Peking*, 716 F.2d 130, 131 (2d Cir.1983); see 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

[17] *McCarthy v. The Bark Peking*, 716 F.2d 130, 132-3 (2nd Cir.1983). See also *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir.1982), cited with approval by Justice O'Connor in the *Perini* footnote quoted above.

[18] 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984), *rehearing denied*, 466 U.S. 994, 104 S.Ct. 2378, 80 L.Ed.2d 850 (1984).

Charles Press. The motion of the United States to dismiss the amended complaint is denied.

III.

What remains for disposition is the United States' alternative motion—which Eagle-Picher opposes—to certify to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b), the legal issue canvassed in Part II of this opinion. Section 1292(b) authorizes a district judge to certify an interlocutory order for appellate consideration when the judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." The prescribed conditions are assuredly met here. Moreover, resolution of the issue by the Third Circuit can be expected to expedite disposition of what the United States characterizes as "100 or more similar cases in the Eastern District of Pennsylvania in which Raymark Industries, Inc. has impleaded the United States on the same theory as Eagle-Picher." Letter of January 16, 1987, to the court from Robert N. Kelly, Esq., p. 2.[19] More to the point, a Third Circuit ruling on an issue which has engaged the attention of the First, Second, Fifth and Ninth[20] Circuits should give added dimension to the resolution of the issue by the Supreme Court if that tribunal in due course concludes that further review is in

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[19] *See also* Letter of February 12, 1987, to the court from Joe G. Hollingsworth, Esq.; Letter of March 4, 1987, to the court from Robert N. Kelly, Esq.

[20] See note 14, *supra*. Other courts of appeals have discussed "maritime [tort] jurisdiction," but none seems to have directly addressed the § 905(b) controversy reflected in *Drake, All Maine Asbestos Litigation, Hall, May v. Transworld Drilling Co.*, and *McCarthy v. The Bark Peking*.

order.[21] Accordingly, the motion of the United States to certify the interlocutory order to the Court of Appeals is granted.

Conclusion

In an order accompanying this opinion, (1) the motion of the United States to dismiss is denied, and (2) the parties are directed to submit a jointly prepared draft form of order of certification.[22]

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[21] The Court denied certiorari to review *Drake* and *All Maine Asbestos Litigation*, 476 U.S. ___, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986). Justice White, in a dissenting memorandum, stated that he thought review of the conflict between the First Circuit decisions and the Fifth Circuit's decision in *Hall* was called for.

[22] It seems sensible for the parties to try to fashion an agreed formulation of the issue of law to be certified to the Court of Appeals. If their collaborative effort is unfruitful, I will formulate the issue. Eagle-Picher's participation in preparing a joint draft form of order is without prejudice to its entitlement to persevere in its opposition to certification.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EAGLE-PICHER INDUSTRIES, INC.	:	
	:	
	:	
v.	:	
	:	CIVIL ACTION
UNITED STATES OF AMERICA	:	NO. 85-4846

ORDER

POLLAK, J. March 18, 1987

Filed March 18, 1987

For the reasons stated in the attached opinion, it is hereby ORDERED and DIRECTED that:

(1) The motion of the United States to dismiss is DENIED.

(2) The motion of the United States for Certification of Interlocutory Appeal is GRANTED. The parties shall submit a jointly prepared draft form of order of certification to this court on or before April 17, 1987.

/s/ J. POLLAK
POLLAK, J

ENTERED: 3/19/87
Clerk of Court
March 18, 1987

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-1361

EAGLE-PICHER INDUSTRIES, INC.
vs.
UNITED STATES OF AMERICA,
Appellant

(D.C.Civil No. 85-4846)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GREENBERG, SCIRICA and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel December 7, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 19, 1987 as certified to this Court pursuant to 28 U.S.C. §1292(b) by order entered May 29, 1987, be and the same is hereby reversed and the cause remanded to the said District Court for entry of judgment for the United States. Each side to bear its

own costs. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Sally Mrvos
CLERK

May 10, 1988

APPENDIX D

United States District Court,
E.D. Pennsylvania.

Civ. A. No. 82-0685.

George A. and Mary Rose COLOMBO

v.

JOHNS-MANVILLE
CORPORATION, et al.

PITTSBURGH CORNING
CORPORATION

v.

UNITED STATES of America.

Nov. 19, 1984.

Justine Gudenas, James R. Moyles, Philadelphia, Pa., for plaintiffs.

Arthur Makadon, Philadelphia, Pa., for Raybestos-Manhattan, Inc.

Byron L. Milner, Bennett, Bricklin, Saltzburg & Fullem, Philadelphia, Pa., for Nicolet, Inc.

Peter P. Liebert, 3rd, Liebert, Short, Fitzpatrick & Lavin, Philadelphia, Pa., for Fibreboard Corp.

Andrew J. Trevelise, Malcolm & Riley, West Chester, Pa., for The Celotex Corp.

Stewart C. Crawford, Swarthmore, Pa., for Delaware Insulation Co.

Francis E. Shields, Pepper, Hamilton & Scheetz, Philadelphia, Pa., for Amatex Corp.

Lise Luborsky, Duane, Morris & Heckscher, Philadelphia, Pa., for D.A.R. Industrial Products, Inc.

Robert St. Leger Goggin, Philadelphia, Pa., for Johns-Manville Corp., Johns-Manville Sales Corp.

Edward J. David, Philadelphia, Pa., for Pittsburgh Corning Corp.

Dudley Hughes, Philadelphia, Pa., for Unarco Industries, Inc.

Joseph M. O'Neill, Philadelphia, Pa., for Armstrong World Industries, Inc.

Charles J. Kalinoski, Edward Greer, Mesirov, Gelman, Jaffe, Cramer & Jamieson, Philadelphia, Pa., for GAF Corp.

Joseph H. Foster, White & Williams, Philadelphia, Pa., for Forty-Eight Insulations, Inc.

Barbara Pennell, Philadelphia, Pa., William J. Spriggs, Washington, D.C., for Eagle-Picher Industries, Inc.

John F. Ledwith, Philadelphia, Pa., for Keene Corp.

Peter J. Lynch, Philadelphia, Pa., for Owens-Illinois Glass Co.

Joan K. Garner, Asst. U.S. Atty., Philadelphia, Pa., Robert N. Kelly, Trial Atty., U.S. Dept. of Justice, Washington, D.C., for U.S.A.

Kevin C. McCullough, Philadelphia, Pa., for Pittsburgh Corning Corp.

Walter L. McDonough, Philadelphia, Pa., for Pacor, Inc.

OPINION

LOUIS H. POLLAK, District Judge.

I. INTRODUCTION

Plaintiff George Colombo alleges that, while an employee of the United States at the Philadelphia Naval Ship-

yard, he was exposed to asbestos-containing products manufactured or distributed by defendants, and that this exposure caused a number of severe injuries. Mr. Colombo alleges that he may have suffered some of his exposure to asbestos particles while working on vessels owned by the United States. Defendant Pittsburgh-Corning's third-party complaint seeks indemnity or contribution from the United States for any damages that plaintiff may recover from Pittsburgh-Corning in this action. Pittsburgh-Corning raises eight distinct legal theories in support of its claim for indemnity or contribution.

The United States has moved to dismiss Pittsburgh-Corning's third-party complaint, or in the alternative for summary judgment. Eagle-Picher Corporation, another defendant, requested leave to file a brief and participate in oral argument in opposition to the United States' motion. That leave was granted because Eagle-Picher has pending in this case a motion for leave to file a third-party complaint substantially identical to Pittsburgh-Corning's third-party complaint.

Briefing the United States' motion involved preparation of considerable amounts of material. The parties requested, and obtained, several extensions and also leave to file reply and surreply memoranda. After completion of briefing, I heard argument on July 5, 1984. At that time, the United States raised an issue concerning the sixth of Pittsburgh-Corning's claims which no party had to that point adequately briefed. Accordingly, I permitted the United States, Pittsburgh-Corning, and Eagle-Picher additional time to file supplemental memoranda on this issue. This opinion resolves the issues raised by the United States' motion. In addition, the Opinion and the accompanying Order necessarily resolve the motions of Pittsburgh-Corning and Raymark for leave to file third-party complaints.

II. UNITED STATES' MOTION TO DISMISS PITTSBURGH-CORNING'S THIRD-PARTY COMPLAINT, OR FOR SUMMARY JUDGMENT

A. *Timeliness of Pittsburgh-Corning's Third-Party Complaint*

Federal Rule of Civil Procedure 14(a) permits any defending party to serve a third-party complaint. "The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action." Fed.R.Civ.P. 14(a).

Pittsburgh-Corning filed its original answer to plaintiff's complaint on April 16, 1982. Pittsburgh-Corning did not move for leave to file its third-party complaint until June 23, 1983. No party objected to Pittsburgh-Corning's motion, so I granted that motion as unopposed on July 18, 1983. However, this court's Local Rule of Civil Procedure 22(a) provides:

> Applications pursuant to F.R.Civ.P. 14 for leave to join additional parties after the expiration of the time limits specified in that rule will ordinarily be denied as untimely unless filed not more than ninety (90) days after the service of the moving party's answer. If it is made to appear, to the satisfaction of the court, that the identity of the party sought to be joined, or the basis for joinder, could not, with reasonable diligence, have been ascertained within said time period, a brief further extension of time may be granted by the court in the interests of justice.

E.D.Pa.R.Civ.P. 22(a).

The language of Local Rule 22(a) strongly suggests that I erred in granting Pittsburgh-Corning's motion for leave to file an amended complaint when I did so on July 18, 1983. In fact, a three-judge panel of this court, on which

I sat, came to precisely that conclusion with respect to an identical motion filed by Pittsburgh-Corning on the same day—June 23, 1983—in a different asbestos case. *Lovallo v. Pittsburgh Corning Corp.*, 99 F.R.D. 627 (E.D.Pa. 1983). Nevertheless, developments since July 18, 1983 lead me to conclude that I should neither (1) vacate my Order of that date permitting the filing of Pittsburgh-Corning's third-party complaint, as untimely filed.

The *Lovallo* panel did not render its Opinion until October 24, 1983. By that time, Pittsburgh-Corning's third-party complaint had been served three months before. *See* Third-Party Return of Summons (filed September 1, 1983). The United States moved to dismiss, or, in the alternative, for summary judgment on, that third-party complaint on September 26, almost a full month before the *Lovallo* decision. The United States' memorandum in support of its motion raised Pittsburgh-Corning's timeliness in a footnote, but the United States argued the merits of its motion for 56 pages supplemented with hundreds of pages of exhibits. The United States having moved, Pittsburgh-Corning had the right to respond, which it did at great length. The parties have devoted enormous effort to filing extensive, thorough, and helpful briefs on the issues raised by the United States' motion. Moveover, at argument the United States did not press its Local Rule 22(a) argument with any force.

Having improvidently granted Pittsburgh-Corning's motion for leave to file a third-party complaint in the first place, I cannot now responsibly vitiate the massive efforts expended on the merits of the United States' motion by dismissing Pittsburgh-Corning's third-party complaint on a technicality. The rules grant me discretion not to apply Local Rule 22(a)'s strict time requirement in such an instance. Local Rule 22(a) only provides that a motion for leave to file a third-party complaint will "ordinarily" be denied if it comes late. E.D.Pa.R.Civ.P. 22(a). This is no "ordinary" case. Moreover, Federal Rule 6(b) permits me

to enlarge the time set by Local Rule 22. Fed.R.Civ.P. 6(b)(2). Accordingly, I will treat Pittsburgh-Corning's third-party complaint as if it were timely filed.

This conclusion creates a question concerning defendants Raymark Industries, Inc. and Eagle-Picher, Inc. On August 4, 1983, Raymark filed a motion for leave to file a third-party complaint identical in all pertinent respects to Pittsburgh-Corning's. On August 22, I granted that motion as uncontested. However, on September 8, 1983, I amended my August 22 Order because, in the interim, I had learned of the pendency of *Lovallo*, a case which appeared to present the same issue.[1] Under the order as amended on September 8, Raymark could file its third-party complaint in this case if the three-judge court in *Lovallo* permitted Raymark to file its identical third-party complaint in this case. Thus, Raymark's motion for leave to file a third-party complaint in this case was keyed to the *Lovallo* decision.

On the other hand, Eagle-Picher's motion for leave to file a third-party complaint against the United States has been keyed to the resolution of the United States' motion to dismiss Pittsburgh-Corning's third-party complaint in this case. Eagle-Picher filed its motion for leave to file a third-party complaint on September 19, 1983. On September 26, the United States filed its motion to dismiss the Pittsburgh-Corning third-party complaint. Eagle-Picher requested that I retain its motion under advisement pending resolution of the motion to dismiss, but that I grant Eagle-Picher leave to brief and argue in opposition to the United States' motion. I granted Eagle-Picher's request.

In my view, the resolution of Raymark's motion for leave to file a third-party complaint, as well as the reso-

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[1] On August 25, 1983, three days after I entered the Order granting Raymark's motion for leave to file a third-party complaint, Chief Judge Luongo entered an Order establishing a three-judge panel to consider Raymark's motion for leave to file in *Lovallo Lovall v. Raymark Industries, Inc.*, Civil Action No. 82-2182 (August 25, 1983).cm

lution of Eagle-Picher's parallel motion, should follow the result reached on the United States' motion to dismiss Pittsburgh-Corning's complaint in this case, and not the result reached on Raymark's and Eagle-Picher's motions in *Lovallo*. Ideally, I would have anticipated *Lovallo's* result before the United States had moved to dismiss Pittsburgh-Corning's complaint. As I think it now prudent to permit Pittsburgh-Corning's complaint to remain filed and to be tested by the United States' motion, I think equity demands equivalent treatment for other third-party plaintiffs in this case.

B. *Pittsburgh-Corning's Claims*

Pittsburgh-Corning's third-party complaint is divided into eight more-or-less separate claims for relief. I describe them briefly here before addressing the merits of the United States' motion to dismiss, or for summary judgment.[2]

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dustries, Inc., Civil Action No. 82-2182 (August 25, 1983).cm [2] I have benefited greatly in the analysis which follows from Judge Gignoux's recent series of opinions dealing with the United States' motion to dismiss, or for summary judgment on, two "model" third-party complaints filed by defendants in a number of asbestos cases pending in the United States District Court of the District of Maine. The cases in Maine fell into two groups: those brought by plaintiffs who had worked at the Bath Iron Works ("BIW"), a private employer, and those brought by plaintiffs who had worked at the Portsmouth Naval Shipyard ("PNS"), where the employer was the United States. Defendants in the BIW cases filed "Model Third-Party Complaint A" and defendants in the PNS cases filed "Model Third-Party Complaint B." Counsel in the cases pending here have represented that Pittsburgh-Corning's third-party complaint here is substantially identical to "Model Third-Party Complaint B" filed in Maine. *See In re All Maine Asbestos Litigation*, 581 F.Supp. 963 (D.Me.1984) ("Maine I"); *In re All Maine Asbestos Litigation ("BIW Cases")*, 589 F.Supp. 1571 (D.Me.1984) *("BIW II")*; *In re All Maine Asbestos Litigation ("BIW Cases")*, 589 F.Supp. 1563 (D.Me.1984) *("BIW III")*; *In re All Maine Asbestos Litigation ("PNS Cases")*, 589 F.Supp. 1571 (D.Me.1984) *("PNS II")*. *BIW II* is a bench opinion; it is published as an appendix to BIW III.

1. *Negligent Failure to Warn of Seller*

Pittsburgh-Corning brings its first claim for contribution under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. Pittsburgh-Corning alleges that the United States sold raw asbestos to Pittsburgh-Corning which Pittsburgh-Corning incorporated in products it sold in turn to plaintiff's employers. Pittsburgh-Corning alleges that the United States negligently breached its duty to warn potential buyers and users of that raw asbestos of the "potential dangers, hazards and risks of harm from exposure to asbestos." Third-Party Complaint ¶¶ 5-10. Pittsburgh-Corning has taken the position that this claim arises out of an obligation imposed by Pennsylvania law.

2. *Strict Liability of Seller*

Pittsburgh-Corning's second claim is also one for contribution under the Federal Tort Claims Act. In its second claim, Pittsburgh-Corning alleges that, under Pennsylvania law, the United States is strictly liable to it for plaintiff's damages because the United States sold Pittsburgh-Corning an unreasonably dangerous product which Pittsburgh-Corning later resold and to which plaintiff was later exposed.

3. *Implied Warranty of Fitness for Intended Purpose*

Pittsburgh-Corning's third claim alleges that, in the course of selling asbestos to Pittsburgh-Corning, the United States impliedly warranted that asbestos' safety and its fitness for its intended purpose. Pittsburgh-Corning contends that if plaintiff can establish Pittsburgh-Corning's liability to him, then the United States will have breached this implied warranty and must indemnify Pittsburgh-Corning. This claim arises under contract law and this court allegedly has jurisdiction under 28 U.S.C. § 1346(a)(2), a section of the Tucker Act.

4. *Implied Warranty from Specifications*

Pittsburgh-Corning's fourth claim alleges that all work performed at the Philadelphia Naval Shipyard, during the

course of which plaintiff was allegedly exposed to Pittsburgh-Corning's products, complied with specifications promulgated by the United States. Pittsburgh-Corning alleges that, in issuing these specifications, the United States impliedly warranted that asbestos-containing products used pursuant to those specifications would not injure those products' intended users. Pittsburgh-Corning therefore seeks indemnification from the United States for any breach of that warranty; plaintiff's recovery in this case would allegedly constitute such a breach. Like the third claim, this claim arises under contract law and this court allegedly has jurisdiction under 28 U.S.C. § 1346(a)(2), a section of the Tucker Act.

5. *Negligence as a Controller of Work Site*

Pittsburgh-Corning's fifth claim seeks indemnity in tort based upon a range of alleged breaches of the United States' duty to exercise ordinary care in the management of asbestos-containing products at the Philadelphia Naval Shipyard. Pittsburgh-Corning alleges that the United States negligently specified the characteristics of the products which it ordered, that the United States negligently failed to warn its employees about those products' hazards, and that the United States negligently failed to supervise the use of those products at the shipyard. As this claim is based upon Pennsylvania tort law, Pittsburgh-Corning brings it under the Federal Tort Claims Act.

6. *Negligence as Employer and Shipowner*

Pittsburgh-Corning's sixth claim for relief seeks to recover for the United States' negligence (1) as Mr. Colombo's employer, and (2) as the owner of vessels on which Mr. Colombo allegedly worked. The claim against the United States as an employer arises under Pennsylvania tort law and largely overlaps Pittsburgh-Corning's fifth claim for relief. The claim against the United States as vessel owner assertedly arises under federal maritime law, which imposes a duty of ordinary care upon vessels. Both,

however, are asserted against the United States through the Federal Tort Claims Act.

7. *Good Samaritan Doctrine*

Pittsburgh-Corning's seventh claim for relief seeks contribution under Pennsylvania tort law. Pittsburgh-Corning alleges that the United States engaged in a course of study and regulation of the use of asbestos. Pittsburgh-Corning contends that this course resulted in the assumption by the United States of a duty to exercise ordinary care in its regulation of asbestos products. Pittsburgh-Corning alleges that the United States breached that duty of ordinary care and therefore must contribute under the Federal Tort Claims Act to any recovery which plaintiff may receive from Pittsburgh-Corning.

8. *Failure to Warn About Tobacco*

Pittsburgh-Corning's eighth claim is a subsidiary aspect of its seventh claim. Specifically, Pittsburgh-Corning alleges that the United States breached the ordinary duty of care which it had assumed to warn plaintiff about the synergistic effects of exposure to asbestos fibers and cigarette smoking.

C. *Claims Barred by the Pennsylvania Workmen's Compensation Act*

Pittsburgh-Corning's third-party complaint seeks recovery from plaintiff's employer, the United States. Section 303 of the Pennsylvania Workmen's Compensation Act ("PWCA"), Pa.Stat.Ann. tit. 77, § 481 (Purdon Supp.1983), provides generally that workers' compensation benefits are the exclusive remedy which injured employees may obtain from their employers for injuries suffered in the course of employment. The United States argues that this provision bars all claims against the United States which derive from Pennsylvania tort law. Specifically, the United States seeks to dismiss Pittsburgh-Corning's first, second, fifth, sixth, seventh, and eighth claims on this ground.

On its face, the PWCA does not apply to a federal employee's employment relationship. *See Baksalary v. Smith,* 579 F.Supp. 218, 222 (E.D.Pa.1984) (three-judge panel). The act applies only to "employees" who perform work under the control of an "employer." Pa.Stat.Ann. tit. 77, § 22 (Purdon Supp.1983). The federal government is not an "employer" under the Act. Pa.Stat.Ann. tit. 77, § 21 (Purdon Supp.1983). Instead, federal employees are covered by the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193. Like most workers' compensation statutes, FECA includes an "exclusive liability" provision limiting the employer's—here, the United States'—liability for its employee's injury sustained in the course of the employee's employment. Section 8116(c) provides:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

Section 8116(c) limits the liability of the United States to "any other person otherwise entitled to recover damages from the United States. . . ." However, the Supreme Court has recently held that a third party who is sued by a federal employee may bring a third-party complaint against the United States, notwithstanding section 8116(c)'s

limitation: "[s]ection 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them." *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, 103 S.Ct. 1033, 1037, 74 L.Ed.2d 911 (1983). Therefore, FECA does not bar Pittsburgh-Corning's third-party complaint. *PNS II,* 589 F.Supp. at 1574; *Prather v. Upjohn Co.,* 585 F.Supp. 112, 113 (N.D.Fla. 1984).

In both *PNS II* and *Prather,* third-party plaintiffs contended that *Lockheed* created a third-party right of action for defendants asserting contribution or indemnity claims. Both Judge Gignoux in *PNS II* and Judge Vinson in *Prather* rejected this contention. "*Lockheed* does not automatically entitle [a defendant] to bring an indemnity or contribution action against the United States . . . [I]t is necessary . . . to look at the . . . substantive law in each instance." *Prather,* 585 F.Supp. at 113; *accord PNS II,* 589 F.Supp. at 1574. In *Lockheed,* the Court assumed that Lockheed had a substantive third-party claim against the United States; the sole question was whether FECA barred that claim. *Lockheed,* 103 S.Ct. at 1037 n. 8.

The parties to this action therefore agree that I must refer to the substantive law applicable to each of Pittsburgh-Corning's claims to determine whether that claim is viable. For Pittsburgh-Corning's tort-based claims, I must begin with the Federal Tort Claims Act, the United States' waiver of sovereign immunity for tort claims. The FTCA provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. Therefore, the applicable substantive law, the FTCA, requires a further reference to the sub-

stantive law which would apply to "a private individual under like circumstances. . . ."

A "private individual under like circumstances" to the United States in this case is a private shipyard employer in Pennsylvania. All private employers, with certain inapplicable exceptions, are subject to the PWCA. Pa.Stat.Ann. tit. 77, § 21 (Purdon Supp.1983). This coverage is mandatory. Pa.Stat.Ann. tit. 77, § 431 (Purdon Supp.1983); *see also Baksalary,* 579 F.Supp. at 230-231 n. 19. Thus, a private shipyard employer in Pennsylvania would be subject to the provisions of PWCA. The parties nevertheless disagree as to whether for the purpose of testing the viability of Pittsburgh-Corning's third-party claims the United States is to be treated as if it were subject to PWCA.

The reason for this disagreement is that section 303 of PWCA would arguably bar Pittsburgh-Corning's claim if the United States is to be treated as an employer subject to PWCA. Section 303(b) provides, in pertinent part:

> In the event injury or death to an employe is caused by a third-party, then such employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employes, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.

Pa.Stat.Ann. tit. 77 § 481(b) (Purdon Supp.1983).

The Pennsylvania Supreme Court has summarized the purpose and effect of this statute as follows:

> Section 303(b) creates an exception to the general right to contribution from joint tortfeasors. Under that section, a third party whose negligence is responsible, in part, for an injury suffered by an employee protected by the Workmen's Compensation Act, may not, in the suit brought by the employee against him, join the employer as an additional defendant. Nor may the third party otherwise seek contribution or indemnity from the employer, even though the employer's own negligence may have been the primary cause of the injury.

Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 412 A.2d 1094, 1096 (1980); *see also Heckendorn v. Consolidated Rail Corp.*, 502 Pa. 101, 465 A.2d 609, 611 (1983) (citing cases). Our Court of Appeals has stated that section 303(b)'s bar on joinder of employers as third-party defendants on barred claims applies not only in state court but also in federal court. *Erie Castings Co. v. Grinding Supply, Inc.*, 736 F.2d 99, 101 (3d Cir.1984). Thus, if Colombo's injury was employment-related and if the United States should be treated as Colombo's employer under the PWCA, section 303(b) would bar Pittsburgh-Corning's claims. *See Ryden v. Johns-Manville Products*, 518 F.Supp. 311 (W.D.Pa.1981).

Pittsburgh-Corning and Eagle-Picher argue that PWCA section 303(b) bars none of Pittsburgh-Corning's claims because section 303(b) cannot apply to the United States. These third-party plaintiffs suggest that a "private individual under like circumstances" to the United States for purposes of FTCA means a private employer covered by FECA and not by PWCA. Pittsburgh-Corning and Eagle-Picher correctly point out that PWCA excludes federal employment relationships from its scope and FECA expressly covers this employment relationship. From these

facts, third-party plaintiffs conclude that FTCA does not incorporate PWCA's exclusivity provision.

I find this argument unpersuasive. A private shipyard employer in Pennsylvania would have to be covered by PWCA, and the FTCA defines the United States' liability as that of "a private individual under like circumstances." 28 U.S.C. § 2674. Therefore, unless the phrase "under like circumstances" is read to nullify the phrase "private individual" and not to modify it, PWCA must apply to Pittsburgh-Corning's claims. It is of course possible to argue that FECA is one of the "circumstances" which define the liability of the United States as shipyard employer; FECA does not, however, apply to a "private individual." Applying FECA would therefore be facially inconsistent with the language of the FTCA. In short, I can see no reason why the Pennsylvania substantive law governing a claim against the United States under FTCA should not include PWCA when *all* private individuals in Pennsylvania fall within its scope. Judge Gignoux reached the same conclusion with regard to the Maine Workers' Compensation Act in *PNS II:*

> The Court agrees with the United States that its status at PNS is analogous to that of a compensation-paying private shipyard employer in Maine. Such an employer would be covered by the Maine Workers' Compensation Act. . . . Section 4 of the Maine Act . . ., as interpreted by the Maine Court, provides a covered employer with immunity from third-party claims for noncontractual contribution or indemnity arising from work-related injuries to its employees. . . . This Court has recently held that BIW, a compensation-paying private shipyard employer in Maine, is immunized by Section 4 from such third-party suits brought against it as an employer. *In re All Maine Asbestos Litigation (BIW Cases),* 589 F.Supp. 1563 (D.Me.July 5, 1984). Since the FTCA subjects the United States only to analogous private

> liability, the United States enjoys the immunity provided by Section 4 of the Maine Act to a compensation-paying private shipyard employer from third-party suits for non-contractual contribution or indemnity brought against it in its capacity as an employer.

PNS II, *supra*, 589 F.Supp. at 1574-75 (citations omitted).

In this circuit, Judge Ziegler has applied the same reasoning. In *Giannuzzi v. Doninger Metal Products*, 585 F.Supp. 1306 (W.D.Pa.1984), plaintiff claimed that he was injured in the course of his employment for the Postal Service when a mail container fell on him. Plaintiff sued the container's manufacturer. The manufacturer sought to join the United States as a third-party defendant on the theory that the United States had negligently maintained the container. Judge Ziegler reasoned as follows:

> The federal government's liability shall be determined "in accordance with the law of the place where the (wrongful) act or omission occurred." 28 U.S.C. § 1346(b). We will therefore consult Pennsylvania law because the injury and the alleged breach of the duty to exercise reasonable care occurred in Pennsylvania.
>
> The law to be applied is the Pennsylvania Workmen's Compensation Act. 77 P.S. § 1 *et seq.* . . .
>
> As interpreted by the Pennsylvania courts, the Workmen's Compensation Act has "obliterated" the common law cause of action against an employer and foreclosed the adjudication of liability on the part of the employer, whether as the initial defendant or as a third-party defendant.

Giannuzzi, 585 F.Supp. at 1308. Judge Ziegler therefore granted the United States' motion to dismiss.

For these reasons, to the extent that section 303(b) of PWCA would bar Pittsburgh-Corning from initiating a

third-party proceeding against a private shipyard employer if Pittsburgh-Corning were being sued by a worker employed by the private shipyard, the United States' motion to dismiss or for summary judgment must be granted. Unless Pittsburgh-Corning can avoid the operation of section 303(b) as a bar to its first, second, fifth, sixth, seventh, and eighth claims for relief, those claims are barred.

Having decided that PWCA's exclusion *can* apply to the United States, I must decide whether it *does* apply under the circumstances of this case. This requires consideration of two theories which might be raised in order to avoid section 303(b)'s prohibition of actions against an employer. I now turn to these two theories.

1. *Injury not in the course of employment*

Section 303(b) only bars suits against employers based upon "injury or death to an employe. . . ." Pa.Stat.Ann. tit. 77, § 481(b). (Purdon Supp.1983). Section 303(a) defines "injury or death to an employe" by reference to section 301(c), Pa.Stat.Ann. tit. 77, § 411 (Purdon Supp.1983). Section 301(c)(1) defines "injury" "to mean an injury to an employee . . . arising in the course of his employment and related thereto. . . ." *Id.*, § 411(1). Section 301(c)(2) provides in part that "[t]he terms 'injury,' 'personal injury,' and 'injury arising in the course of his employment,' used in this act, shall include, unless the context clearly requires otherwise, occupational disease as defined in section 108 of this act. . . ." *Id.*, § 411(2).

Plaintiff alleges that he was exposed to asbestos fibers manufactured or distributed by defendants in the course of his employment at the Philadelphia Naval Shipyard from August 11, 1958, until the present. Complaint ¶ 7. As a result of this exposure, Mr. Colombo alleges that he has contracted or may contract asbestosis, lung cancer, mesothelioma, and other unspecified injuries. "Asbestosis and cancer resulting from direct contact with, handling of, or exposure to the dust of asbestos in any occupation in-

volving such contact, handling or exposure" constitute occupational disease within the meaning of section 108 of PWCA. Pa.Stat.Ann. tit. 77, § 27.1(*l*) (Purdon Supp.1983). Accordingly, Mr. Colombo has alleged an injury in the course of his employment for purposes of section 303(b). Presumably for this reason, neither Pittsburgh-Corning nor Eagle-Picher has suggested that their claims do not fall within section 303(b) because Mr. Colombo's injury was not in the course of his employment.

2. *Dual Capacity*

Under the "dual capacity" doctrine, an employer "may become liable to an employee for actions undertaken in an additional and separate capacity from that of an employer." *Weldon v. Celotex Corp.*, 695 F.2d 67, 71 (3d Cir.1982); *see also* 2A Larson, *Workmen's Compensation Law* § 72.80 (1983); Annot., 23 A.L.R. 4th 1151 (1983). In *Tatrai v. Presbyterian University Hospital*, 497 Pa. 247, 439 A.2d 1162 (1982), the Pennsylvania Supreme Court appears to have accepted the view that PWCA's exclusivity provision might not bar some suits by an employee against his employer because the latter acted in a nonemployer capacity when it caused the employee's injury. The question presented here is whether, in a hypothetical law suit identical in all respects with the one at bar except that plaintiff's employer is a *private* shipyard, a Pennsylvania court would read *Tatrai* as permitting Pittsburgh-Corning to pursue a third-party claim against the shipyard.

Tatrai involved a suit by a hospital employee against the hospital. Ms. Tatrai became ill while at work. No doctor was available at the Employee Health service, so Ms. Tatrai was instructed to go to the hospital's emergency room. She received treatment there for which the hospital billed Blue Cross; the hospital thus followed the procedure it customarily pursued with respect to paying patients. While in the emergency room, Mr. Tatrai was injured when a table collapsed. She brought an action against the hos-

pital for damages for the resulting injuries. The Pennsylvania Supreme Court held[3] that Ms. Tatrai could proceed with her claim against her employer because "[t]here is no basis for distinguishing appellant, a paying customer, from any other member of the public injured during the course of treatment." 439 A.2d at 1166.

In *Budzichowski v. Bell Telephone Co. of Pa.*, 503 Pa. 160, 469 A.2d 111 (1983), the Pennsylvania Supreme Court rejected an employee's claim that the telephone company acted in a "dual capacity" when it provided medical care for him at the company's dispensary. "The treatment received by appellant at the Bell dispensary was not available to the general public and would not have been available to appellant but for his employment relationship with Bell. . . . Bell was not operating in a 'dual capacity,' but rather only in its capacity as employer of appellant." 469 A.2d at 115.

The United States takes the position that these decisions of the Pennsylvania Supreme Court, and subsequent decisions of other courts applying them, have no relevance for its motion to dismiss. The United States takes the position that because the United States Supreme Court has rejected the dual capacity doctrine in certain employee suits against the United States under FECA or LHWCA, that doctrine cannot apply here. This position misconceives the inquiry. Mr. Colombo has not sued the United States, his former employer. In a suit by Mr. Colombo, FECA's exclusivity provision would apply and federal law would

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[3] Justice (now Chief Justice) Nix wrote the court's opinion in *Tatrai*. However, no other justice joined that opinion. Justice Roberts filed a concurring opinion in which Chief Justice O'Brien, Justice Larsen and Justice Flaherty joined. Justices Kauffman and Wilkinson did not participate in the decision of the case. Therefore Justice Roberts' opinion is the decision which binds a federal court interpreting Pennsylvania law. *See Weldon v. Celotex Corp.*, 695 F.2d 67, 71 (3rd Cir.1982) (expressly rejecting Justice Nix's position as not representing the *Tatrai* majority).

determine whether FECA permits suits against the United States under the dual capacity theory. In this case, however, FECA's exclusivity provision does not apply, as the Supreme Court held in *Lockheed*. The governing law is the Pennsylvania law of dual capacity, made applicable by the FTCA to the United States.

Pittsburgh-Corning's first and second claims for relief attempt to impose liability upon the United States in its capacity as a seller of raw asbestos. Judge Takiff has rejected the argument that an employee of an asbestos producer could sue his employer in his capacity as the manufacturer of the asbestos products to which the employee was exposed. Judge Takiff reasoned:

> Product malfunction or defect causing employee injury while engaged in the course of the employer's business may well be a breach of the employer's duty to provide a safe working environment. Consequently, that an employer happens to be the manufacturer of an allegedly defective product used by the employee in the workplace in the very performance of the work for which he was engaged should not take the employer outside the compensation mechanism; it is a coincidence which does not disturb the fundamental obligations and expectations arising between employer and employee.

Anastasi v. Pacor, Inc., 7 Phila. 488, 516 (1982), *appeal pending*, No. 910 Phila. 1983 (Pa.Super.Ct. filed April 7, 1983).[4] Judge Troutman has reached the same result, re-

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[4] Judge Takiff coordinates the asbestos cases for the Pennsylvania Court of Common Pleas for Philadelphia County. Judge Takiff's conclusion is in accord with two decisions of courts in other states considering the applicability of the dual capacity doctrine to an asbestos manufacturer sued by his employee or by another manufacturer for contribution. *See Farrall v. Armstrong Cork Co.*, 457 A.2d 763, 768-770 (Del.Super.Ct.1983); *Quinn v. National Gypsum Co.*, 124 N.H. 418, 469 A.2d 1368 (1983). A federal court in Illinois has reached Judge

lying in part on Judge Takiff's *Anastasi* opinion. *Oyster v. Johns-Manville Corp.*, 568 F.Supp. 83 (E.D.Pa.1983). *Oyster* left intact a decision by a four-judge panel of this court, issued before *Tatrai*, which held employers immune from suit by employees alleging injury from exposure to asbestos products manufactured by their employers. *Kohr v. Raybestos-Manhattan, Inc.*, 522 F.Supp. 1070 (E.D.Pa.1981) (four-judge panel); *see also Tysenn v. Johns-Manville Corp.*, 517 F.Supp. 1290, 1293 (E.D.Pa.1981) (adverting to *Kohr*).

These cases lead me to conclude that if Mr. Colombo had been employed by a private purveyor of asbestos products, Mr. Colombo would have been barred by PWCA from suing his employer for exposure to those products in the course of his employment; the dual capacity doctrine would not enable Mr. Colombo to avoid that bar. This conclusion, in turn, mandates the conclusion that Pittsburgh-Corning could not join a private employer as a third-party defendant here. *See Heckendorn v. Consolidated Rail Corp.*, 502 Pa. 101, 465 A.2d 609 (1983). Section 303(b)'s bar applies when injury occurs to someone employed by a possible defendant or third-party defendant. *Id.* The dual capacity theory, as applied to such a third-party suit, still concerns itself with the employment relationship of the injured individual and the third-party defendant. Therefore, because Mr. Colombo would be barred from suing a private employer/manufacturer for exposure to a negligently manufactured or defective asbestos product, Pittsburgh-Corning would be barred from joining that employer/manufacturer in an action for tort-based contribution or indemnity. Under FTCA, then, Pittsburgh-Corning is barred from bringing its first two claims for relief against the United States.

Takiff's result under the Illinois workers' compensation statute. *In re Johns-Manville/Asbestosis Cases*, 511 F.Supp. 1229, 1232 (N.D.Ill.1981). Judge Takiff has collected non-asbestos cases which reach a similar conclusion. *Anastasi*, 7 Phila. at 507-514, as has an annotation, Annot., 23 A.L.R.4th 1151, 1177-1185 (1983).

Insofar as Pittsburgh-Corning's fifth and sixth claims for relief seek recovery based upon the United States' role as landbased shipyard employer, the foregoing analysis precludes the application of the dual capacity doctrine to permit Pittsburgh-Corning's suit. The obligation of the United States to provide a safe workplace and to warn employees about the hazards of certain materials arises solely out of the employment relationship. There is, in effect, no alternative capacity in which to sue an employer on these theories. Thus, Pittsburgh-Corning's fifth and sixth claims must be dismissed insofar as they invoke non-maritime law.

Pittsburgh-Corning's seventh and eighth claims for relief seek to imply an obligation of the United States to give appropriate warnings of the dangers of asbestos products from the United States' regulation of asbestos production. Obviously, no case can exist in which a private employer regulated the production and manufacture of a product. Therefore, no court can have decided whether the Pennsylvania dual capacity doctrine would permit suit against such an employer by an employee or by a third-party for contribution.

Our Court of Appeals, however, has decided a case in which a private employer engaged in activity analogous to regulation. In *Weldon v. Celotex Corp.*, 695 F.2d 67 (3d Cir.1982), plaintiffs alleged that defendant, a private asbestos miner and manufacturer, had studied the effects of exposure to asbestos and had discovered that asbestos exposure could cause disease. Plaintiffs sought to recover from defendant on the theory that after the end of the employment relationship, defendant had a continuing duty to warn plaintiff of later-discovered dangers. The Court of Appeals held that the dual capacity doctrine announced in *Tatrai* did not permit plaintiff to bring such a claim against his former employer.[5]

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[5] The Third Circuit has recently considered a similar problem under

Weldon, in my view, suggests that the Third Circuit would not predict that a Pennsylvania court would view the capacity of regulator as a "dual capacity." I therefore conclude that Pittsburgh-Corning's seventh and eighth claims for relief must be dismissed.

Pittsburgh-Corning's sixth claim for relief presents a different and more complex problem, involving both the dual capacity doctrine and an argument that the Long-Shoremen and Harbor Workers' Compensation Act ("LHWCA"), by authorizing negligence actions against vessel owners, preempts the PWCA's exclusivity provision. Because those questions are related, I take them up together in the following section.

D. *Negligence of United States as Vessel Owner*

In its sixth claim for relief, Pittsburgh-Corning claims that the United States as vessel owner owed Mr. Colombo a duty, defined by federal law, to exercise care to maintain a safe environment for him and to warn him of the dangers of exposure to asbestos while on the United States' vessels. Like the other tort claims in the third-party complaint, this claim is brought under the Federal Tort Claims Act.[6]

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the doctrine of *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and has concluded that the United States may not be sued for failure to warn a former civilian employee of the United States Navy of radiation dangers discovered after the employee has left government employ. *Heilman v. United States*, 731 F.2d 1104 (3d Cir.1984).

[6] Both the third-party plaintiffs and the United States have assumed that the FTCA provides the jurisdictional basis for this count of the third-party complaint. This opinion accordingly takes the FTCA as the starting point for analyzing this count for purposes of the United States' motion to dismiss or for summary judgment. I note this explicitly because in my judgment, the source (although not the existence) of jurisdiction is a matter of some doubt. The claim in this count is against the United States as vessel owner, and Pittsburgh-Corning repeatedly characterizes the applicable substantive law as federal maritime law.

The FTCA does not, of course, establish standards of care to which the United States must adhere; rather, it requires that for some purposes the United States will be treated a would a "private individual under like circumstances." 28 U.S.C. § 2674. Liability is thus defined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). This law is often defined as that which a state court would apply to the particular claim involved. "Thus, if the state would look

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One might logically infer that this claim arises under federal admiralty jurisdiction. If that is the case, the FTCA by its own terms cannot apply. 28 U.S.C. § 2680(d); *see also* Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.*; United States v. United Continental Tuna Corp., 425 U.S. 164, 176 n. 14, 96 S.Ct. 1319, 1326 n. 14, 47 L.Ed.2d 653 (1976) (1960 amendments to Suits in Admiralty Act have "generally been held to require that those maritime tort claims that were previously cognizable only . . . under the Federal Tort Claims Act now be brought . . . under the Suits in Admiralty Act"). Thus, admiralty jurisdiction and the FTCA are mutually exclusive as potential bases for Pittsburgh-Corning's claim.

A number of courts have faced the question whether asbestos-related claims of shipyard workers fall within the federal courts' admiralty jurisdiction. Most of these have not found admiralty jurisdiction, due to the absence of the maritime connection mandated by *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). *See, e.g., Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir.1984); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.), *cert. dismissed*, ___U.S. ___, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert. denied*, ___U.S. ___, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983); *Owens-Illinois v. United States District Court*, 698 F.2d 967 (9th Cir.1983); *Maine I, supra*, 581 F.Supp. at 974-75. *But see White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir.1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).

It is clear that this court has subject-matter jurisdiction over Pittsburgh-Corning's sixth claim under one of these two jursidictional sources. *See Maine I, supra*, 581 F.Supp. at 974-75. Because the issue has not been briefed or argued, and because my resolution of the United States' motion as to Pittsburgh-Corning's sixth claim does not require a resoltuion of this jurisdictional issue at this time, I do not now decide from which source the court derives its power to hear that claim.

to a state or federal statute in determining the liability of a private person for the tort in question, the same statute will be applied in measuring the conduct of the government." *Lambertson v. United States*, 528 F.2d 441, 444 (2d Cir.), *cert. denied*, 426 U.S. 921, 96 S.Ct. 2627, 49 L.Ed.2d 374 (1976). *See Richards v. United States*, 369 U.S. 1, 11-13, 82 S.Ct. 585, 591-593, 7 L.Ed.2d 492 (1962); *Hess v. United States*, 361 U.S. 314, 318 n. 7, 80 S.Ct. 341, 345 n. 7, 4 L.Ed.2d 305 (1960).

As previously observed, for the purposes of this case a "private individual under like circumstances" is a private shipyard employer in Pennsylvania. The law which Pittsburgh-Corning seeks to apply is section 5(b) of the LHWCA. *See* 33 U.S.C. § 905(b).[7] That section makes ves-

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[7] Section 5(b) of the Act provides as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b). This section has recently been substantially amended. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.L. No. 98-426, § 5(a)(1) (Sept. 28, 1984). The amendments

sel owners liable for negligence to those who qualify under the Act's definition of "employee." *Id.; see Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). The liability defined in section 5(b) applies in actions by the vessel owner's employees. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 2547-48, 76 L.Ed.2d 768 (1983). Thus, an employee of a private shipyard would be able, under the LHWCA, to maintain an action for negligence against the shipyard in its capacity as vessel owner. *Maine I, supra,* 581 F.Supp. at 975. It follows that a third-party action for indemnity or contribution on the same facts would also be permissible, unless the LHWCA itself bars such third-party actions. *Id. See Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, 103 S.Ct. 1033, 1036, 74 L.Ed.2d 911 (1983).

The United States argues that the negligence action authorized by section 5(b) has no application here, because (1) Pennsylvania law prohibits such actions, whether direct or indirect, against covered employers; (2) section 5(a) of the LHWCA bars third-party actions brought under section 5(b) of the same Act; and (3) the substantive law of contribution does not permit this third-party claim. I will address each of these arguments in turn.

1. *Application of the Pennsylvania Workmen's Compensation Act*

I have already held that a private shipyard employer in Pennsylvania would be covered by the Pennsylvania Workmen's Compensation Act. Therefore, that Act, including the exclusivity provision of section 303(b), applies to this third-party FTCA section against the United States. In

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do not, however, apply to injuries suffered before the date of enactment. *Id.* § 28(c). Therefore, the amended version of section 5(b) does not apply to this case.

Unless otherwise specified, I shall refer in this opinion to the former section 5 of the LHWCA as if it were current. I adopt this convention for the sake of convenience.

addition, I have held that section 303(b) requires that the other tort counts in Pittsburgh-Corning's third-party complaint be dismissed, unless either the dual capacity doctrine or some supervening law acts to remove the United States from the protective umbrella section 303(b) creates for Pennsylvania employers. There is no arguable conflict between federal and state law which might preclude application of section 303(b) to the other tort counts. But Pittsburgh-Corning argues that the LHWCA precludes application of section 303(b) to bar to its claim against the United States as vessel owner.

The state and federal statutes conflict only if the former bars a third-party action against a shipyard employer *qua* vessel owner for damages to an employee. There is no conflict if the dual capacity doctrine as defined in Pennsylvania applies to exempt this action from section 303(b). Pittsburgh-Corning argues that the dual capacity doctrine does apply here, because the United States' duty as vessel owner is separate and distinct from its duty as employer.

It is true that, under the LHWCA, a shipyard employer has a duty to harbor workers working on vessels it owns, whether or not those workers are its employees. 33 U.S.C. § 905(b); *see Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 2547-48, 76 L.Ed.2d 768 (1983); *In re All Asbestos Cases,* slip op. at 5-6, 603 F.Supp. 599, 605-06 (D.Hawaii 1984). Thus, the employer/vessel owner's two hats give rise to two sets of duties under the LHWCA: as an employer, the shipyard must pay compensation regardless of fault for its employees' work-related injuries, 33 U.S.C. § 904; as a vessel owner, it must exercise due care to keep its vessels safe for those who work on them. *Id.* at § 905(b). The shipyard may owe both these duties to the same individual, so that differing legal "capacities" result in different liabilities to employees. *Pfeifer, supra,* 103 S.Ct. at 2548.

These different legal liabilities do not, however, require the conclusion that the dual capacity doctrine applies here. An employer who manufactures a product which causes its employee's work-related injury has different legal duties stemming from its separate roles as manufacturer and employer. Nevertheless, as I discussed earlier, courts have not applied Pennsylvania's dual capacity doctrine to suits against the employer-as-product-manufacturer, at least where the employee's injury was suffered incident to his work. *Oyster v. Johns-Manville Corp.*, 568 F.Supp. 83, 87-88 (E.D.Pa.1983); *Silvestri v. Strescon Industries*, 312 Pa.Super. 82, 458 A.2d 246, 247 (1983); *Anastasi v. Pacor, Inc.*, 7 Phila. 488, 516 (Ct.Common Pleas 1982), *appeal pending* No. 910 Phila. 1983 (Pa.Super.Ct. filed April 7, 1983). In such cases, the products liability claim is essentially a claim that the workplace is unsafe. The fact that the dangerousness of the workplace stems from the use of a dangerous or defective product which the employer has manufactured does not change that characterization.

I find no basis for distinguishing such cases from the case of the employer as vessel owner. Pittsburgh-Corning's sixth claim in essence seeks to hold the United States liable for negligently failing to maintain the safety of part of its workplace.[8] That failure allegedly caused injury to a United States employee whose injury was connected with his job and was suffered on the job site. *Cf. Tatrai, supra.* Such an injury "should not take the employer outside the compensation mechanism. . . ." *Anastasi, supra,* 7 Phila. at 516. Moreover, there is no connection between Mr. Colombo's exposure to asbestos particles while working aboard United States vessels and any asbestos-related risks posed by those vessels to the general public. Absent such a con-

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[8] This is equally true of the failure-to-warn claim, which alleges that the absence of adequate warnings rendered the United States' vessels unsafe for those working on them. *See* Third-Party Complaint of Pittsburgh Corning ¶¶ 39-42.

nection, Pennsylvania's dual capacity doctrine does not apply, because the employee's injury does not result from a risk which the employees shared with the general public. *Silvestri v. Strescon Industries*, 312 Pa.Super. 82, 458 A.2d 246, 247 (1983).[9]

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[9] I am aware that, in Justice Roberts' Tatrai opinion, the Pennsylvania Supreme Court used the LHWCA as an example of "the independent force of a duty owed to the general public." 429 A.2d at 1167. In this context, the court quoted the following passage from *Reed v. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963):

> Only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it could not be permitted to avoid.

Id. at 415, 83 S.Ct. at 1353 (quoted in *Tatrai, supra*, 439 A.2d at 1167). Pittsburgh-Corning contends that this discussion indicates that the Pennsylvania Supreme Court would apply the dual capacity doctrine to exempt a claim against a shipyard employer *qua* vessel owner from section 303(b) of the PWCA.

In *Reed v. The Yaka*, the Supreme Court found that the exclusive liability provision of the LHWCA did not bar a longshoreman's action against his employer in its capacity as charterer of the vessel. The Court emphasized the unfairness of precluding the longshoreman from maintaining such an action when other workers, who draw their pay from the independent stevedore but do the same job as the charterer's own employees, could sue the charterer. 373 U.S. at 415, 83 S.Ct. at 1353. The unfairness was especially acute because most workers in the injured party's position were employed by stevedoring companies. Gilmore & Black, the Law of Admiralty 445 (2d ed. 1975) (discussing *Reed*). Hence the bareboat charterer was in the position of guaranteeing the ship's seaworthiness to longshoremen generally, while avoiding any obligation to its own employees, where both sets of harbor workers bore the same risk of harm due to the vessel's unseaworthiness. *Id.*

The aspect of *Reed* on which Justice Roberts focused in *Tatrai* was the existence of a duty to the general public, which was exposed to the same risk as the plaintiff-employee. Justice Roberts emphasized that members of the general public used the hospital emergency room in

This conclusion squarely raises the federal preemption issue: I have now held that section 303(b) of the PWCA would bar Pittsburgh-Corning's sixth claim, and section 5(b) of the LHWCA (as interpreted by the Supreme Court in *Jones & Laughlin Steel Corp. v. Pfeifer, supra*) apparently grants the right to bring such a claim.

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which Ms. Tatrai, a hospital employee, was injured. 439 A.2d at 1166, 1167. Thus, when Ms. Tatrai used the emergency room, she bore the same risk as all the members of the general public to whom the hospital already owed a duty of care. It was pure fortuity that the injury she suffered occurred to her and not to a non-employee patient.

Mr. Colombo, as a United States employee working aboard United States vessels, was in a quite different position. There is no evidence before me that suggests that members of the general public were exposed to asbestos on board United States vessels to the same degree as Mr. Colombo. This case therefore resembles not *Tatrai*, but *Silvestri v. Strescon Industries*, 312 Pa.Super. 82, 458 A.2d 246 (1983), in which the dual capacity doctrine was held not to apply to a construction worker injured by defective concrete flooring which his employer manufactured. The Pennsylvania Superior Court explained its decision as follows:

> In the instant case, Appellant was injured while working with Strescon's "product," the concrete floor. The "dual capacity" alleged by Appellants would be Strescon's status as producer and vendor of a consumer product, namely structural concrete products, such as the concrete floor.
>
> However, Appellant Felice Silvestri was not involved in an activity related to Strescon's "dual capacity" in the instant case. The concrete floor had been manufactured by Strescon to be installed by Strescon directly and not to be sold to the general public. There is no relationship, on the instant facts, between Strescon's activities in the manufacture and sale of its goods to the general public and Appellant's injuries received while installing Strescon's product directly, as an employee of Strescon. Therefore, the exclusivity provisions of the Act apply to the instant case.

Id., 458 A.2d at 247. This reasoning compels a finding that the United States was not acting in a "dual capacity" in connection with Mr. Colombo's injury for purposes of section 303(b) of the PWCA.

In *Sun Ship v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980), the Supreme Court faced the question whether the LHWCA's compensation scheme preempts state workers' compensation laws with regard to land-based harbor workers within LHWCA's coverage. The Court concluded that no such preemptive effect was intended by Congress when in 1972 it extended the LHWCA to include many land-based workers. *Id.* at 720-23, 100 S.Ct. at 2436-38. Instead, the Court decided, Congress meant for the federal compensation scheme to supplement the state statutes and not to replace them. *Id.* Accordingly, the coexistence of state and federal laws with different benefit schedules did not present any conflict.

In a footnote to its preemption discussion, the Court in *Sun Ship* noted that federal and state claims might conflict if the state law expressly made compensatory awards thereunder final. *Id.* at 724 n. 6, 100 S.Ct. at 2438 n. 6. In that event, an injured harbor worker who, having already received benefits under the state law, sought benefits under the LHWCA, would be denied the right to the federal statute's benefits. The court suggested that such a conflict might justify preemption of the state law's exclusivity provision. *Id.* In *BIW III*, Judge Gignoux applied *Sun Ship* to a third-party claim not involving a vessel owner, and therefore not involving section 5(b) of the LHWCA. The only possible conflict in that case was between the state law bar against third-party actions and the federal law permission of such actions under *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983). *See BIW II, supra*, 589 F.Supp. at 1571 (holding that *Lockheed* reasoning applies to permit third party actions under the LHWCA). The underlying claims did not derive from the LHWCA. Judge Gignoux held that under those circumstances there was no actual conflict between the LHWCA and the Maine statute. *BIW III, supra*, 589 F.Supp. at 1568-69. At the same time, he noted that such a conflict might exist in a case

brought under section 5(b) of the LHWCA against a vessel owner/employer. *Id.* at 1569 n. 6.

That conflict is present here. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), squarely holds that section 5(b) gives a harbor worker the right to bring a negligence action against his shipyard employer in its capacity as vessel owner. *Id.*, 103 S.Ct. at 2547-48; *accord Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 264-65, 99 S.Ct. 2753, 2758, 61 L.Ed.2d 521 (1979). *See also Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 41-44 (3d Cir.1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976). And *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), teaches that the nature and scope of the 5(b) action is to be governed by federal law. *Id.* at 165-66 & n. 13, 101 S.Ct. at 1621 & n. 13. *See Maine I, supra*, 581 F.Supp. at 975-76. Moreover, the Court in *Scindia* noted that the legislative history of section 5(b) "states that land-based principles of assumption of risk and contributory negligence are not to be applied in [5(b)] cases." 451 U.S. at 168 n. 14, 101 S.Ct. at 1622 n. 14. There is thus some indication that ordinary state tort law defenses might "knock out of kilter [the] delicate balance" created by the LHWCA. *See Edmonds v. Compagnie Generale Transatlantique, supra*, 443 U.S. at 273, 99 S.Ct. at 2763. Applying § 303(b) of PWCA to cut off this LHWCA § 5(b) action would of course have a much more drastic effect than would application of state-law rules regarding contributory negligence or assumption of risk.

The parties have not produced any evidence that Congress intended to allow state compensation statutes to, in effect, supersede section 5(b) in cases such as this. Nor has the court found any such evidence on its own. I am not faced with a situation where the state statute serves to reinforce or supplement a federally created remedy. *Cf. Sun Ship, supra*, 447 U.S. at 723-25, 100 S.Ct. at 2438-

39. Instead, the PWCA, if applied, would annul the remedy offered by section 5(b). Lacking convincing evidence to the contrary, I conclude that Congress did not intend such a result. The PWCA's exclusivity provision does not apply to Pittsburgh-Corning's sixth claim.

2. *Permissibility of Third-Party Actions under the LHWCA*

The United States argues that section 5(a) of LHWCA, 33 U.S.C. § 905(a), bars third-party actions for contribution or indemnity against private shipyard employers. That provision reads:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

33 U.S.C. § 905(a).

This language "is in all respects identical to the language of the exclusive liability provision of the FECA. . . ." *BIW II*, 589 F.Supp. at 1571. *See* 5 U.S.C. § 8116(c). In *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 103 S.Ct. 1033, 74 L.Ed.2d 911 (1983), the Supreme Court held that 5 U.S.C. § 8116(c)—the exclusive liability pro-

vision of FECA—does not bar a third-party action against the United States, even though the plaintiff could not have sued the United States directly. *Id.*, 103 S.Ct. at 1036-38. The Court stated that there was no indication from the legislative history that Congress was concerned with the rights of unrelated third parties. *Id.* at 1037. Therefore, the Court reasoned, the preclusive language of section 8116(c) applied only to direct actions by employees or those claiming on their behalf. *Id.* at 1038. Judge Gignoux, applying this analysis to a third-party claim against a private shipyard employer, reached the same conclusion as to 33 U.S.C. § 905(a)—Section 5(a) of LHWCA—as *Lockheed* reached regarding FECA:

> Applying the Supreme Court's analysis in *Lockheed* to § 905(a) of the LHWCA, the language of § 905(a) is in all material respects identical to the language of § 8116(c), and the Supreme Court's construction of that language in FECA would appear to be equally applicable to the corresponding LHWCA language. Moreover, a review of the legislative history of the LHWCA, including the 1972 amendments, persuades this Court that it is equally unpersuasive to establish that Congress was concerned with the rights of non-vessel owner third parties. Insofar as unrelated non-vessel owner third parties are concerned, the 1972 amendments involved no "quid pro quo" compromise similar to that which benefited vessel owners. In short, there is no evidence either in the language of the statute or in the congressional history that Congress in any way addressed itself to, or was in any way concerned with, the rights of non-vessel owner third parties.

BIW II, supra, 589 F.Supp. at 1571.

I agree with Judge Gignoux's assessment. Nevertheless, *Lockheed* is not the sole basis for finding that section 5(a) of LHWCA allows third-party actions against an employer

qua vessel owner. Indeed, *Lockheed* presented a situation in which the employer was insulated from any direct action against it by or on behalf of its employee. 5 U.S.C. § 8116(c). The issue was whether that prohibition extended to a third-party action against the employer for damages to be paid over to the employee. Pittsburgh-Corning's sixth claim raises an easier question. Section 5(b) of LHWCA permits *direct* actions against an employer *qua* vessel owner. *Pfeifer, supra,* 103 S.Ct. at 2548.[10] The question here, therefore, is whether section 5(a) precludes third-party actions against an employer who could be sued directly under section 5(b). The Court of Appeals for the Third Circuit has held that such third-party actions are permitted. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 44 (3d Cir.1975) *cert. denied,* 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976).

The cases on which the United States relies are not persuasive. The United States cites cases regarding the liability to third parties of employers who could not be sued directly under section 5. *See, e.g., Passman v. Companhia de Navegacao Maritima Netumar,* 544 F.Supp. 451 (E.D.Pa.1982) *aff'd,* 725 F.2d 669 (3d Cir.1983); *Lucas v. "Brinknes" Schiffahrts Ges.,* 379 F.Supp. 759 (E.D.Pa.1974) (three-judge panel), *cert. denied,* 423 U.S. 866, 96 S.Ct. 127, 46 L.Ed.2d 95 (1975). These authorities do not purport to decide the question the Third Circuit decided in *Griffith:* whether a third-party action might be maintained against an employer *qua* vessel owner. Moreover, to the extent that they hold that third-party suits against non-vessel owner employers are barred by section 5(a), they may be subject to some question in light of

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[10] It makes no difference that FECA would preclude Mr. Colombo from suing the United States directly. Pittsburgh-Corning's sixth claim is brought under FTCA, so that the liability of the United States is the same as that of a private shipyard employer. Such an entity would be subject to direct suit by its employee under section 5(b) as interpreted by the Supreme Court in *Pfeifer.*

Lockheed's interpretation of language almost identical to section 5(a).

The United States also points to the recently enacted amendments to the LHWCA as evidence of Congress' intent to prohibit third-party actions against shipyard employers in their vessel owning capacity. These amendments, signed into law September 28, 1984, appear to prohibit the bringing of suits by employees against their employers as vessel owners, whether such suit is brought "directly or indirectly." Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.L. No. 98-426, § 5(a)(1) (Sept. 28, 1984) (amending section 5(b) of the LHWCA). The 1984 amendments might therefore bar Pittsburgh-Corning's sixth claim, if they applied in this case. But the amendments do not apply in this case. Section 28(c) of the Amendments expressly states that the amendments to section 5 of LHWCA "shall apply with respect to any injury after the date of enactment of this Act."

In a letter to the court written shortly after the 1984 amendments were enacted, the United States appeared to argue that those amendments reflect Congress' intent to preclude third-party actions such as this one, even where the amendments by their own terms do not apply. This argument both violates the most basic canons of statutory construction and contradicts the clear import of the 1984 amendments. The character of the changes made in 1984 are poor evidence of the intent of Congress when the 1972 amendments were enacted. And to the extent the 1984 amendments have any effect at all on the reading of former section 5, that effect is quite the opposite of the one urged by the Government. The 1984 amendments represent a Congressional judgment that the 1972 amendments, as construed by the courts over the last twelve years, should continue to apply in pending cases. If anything, then, the judicial gloss placed on section 5 by *Pfiefer* has, for our purposes, been ratified by Congress.

For the foregoing reasons, I hold that nothing in section 5(a) of LHWCA bars Pittsburgh-Corning's sixth claim.

3. *Permissibility of Third-Party Actions under the Substantive Law of Indemnity and Contribution*

Because of its argument that both PWCA and LHWCA barred Pittsburgh-Corning's sixth claim—an argument I have now rejected—the United States did not focus in its briefs on the effect of the substantive law of indemnity or contribution. Recently, however, the United States has brought to my attention[11] Judge Blumenfeld's decision in *In re General Dynamics Asbestos Cases*, 602 F.Supp. 497 (D.Conn. 1984), in which a third-party claim identical to the one before me was dismissed on the ground that Connecticut law would not permit contribution among joint tortfeasors where both tortfeasors' negligence was "active." *Id.* at 500-01.

Judge Blumenfeld held, as I have in this opinion, that LHWCA defined the United States' duty as vessel owner toward those who worked on its vessels. *Id.* at 500. He went on to hold that the claim before him did not fall within the court's admiralty jurisdiction, and that therefore the federal maritime law of contribution would not apply. *Id.* at 500. Looking to Connecticut law to supply the rule governing contribution in tort cases, Judge Blumenfeld found that contribution would not be permitted under that law. *Id.* at 501.

I need not address here the difficult question whether Pittsburgh-Corning's claim against the United States as vessel owner is within the court's admiralty jurisdiction.

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[11] The United States has apparently filed motions to dismiss third-party complaints against it in a number of asbestos cases in port cities around the country. As rulings on these motions have trickled out, the parties have so informed the court, sending copies of slip opinions and occasionally commenting on the reasoning in those opinions. These efforts have greatly assisted me in ruling on the United States' motion in this case.

See cases cited note 6 *supra*. Nor do I decide whether federal maritime law governs the scope of indemnity or contribution available in this case. *See Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (5th Cir.1984); *compare Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 n. 13, 101 S.Ct. 1614, 1621 n. 13, 68 L.Ed.2d 1 (1981) (federal law shall govern issues arising in negligence actions under LHWCA section 5(b)) *with Edmonds v. Compagnie Generale Atlantique*, 443 U.S. 256, 272 n. 31, 99 S.Ct. 2753, 2762 n. 31, 61 L.Ed.2d 521 (1979) ("our decision [concerning proportionate fault rule in section 5(b) cases] does not necessarily have any effect on situations where . . . the third-party action is not governed by the principles of maritime law"). I am able to withhold decision on these troublesome issues because both Pennsylvania law and federal maritime law provide for contribution among joint tortfeasors, where both are actively negligent. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974); *Eckrich v. DiNardo*, 283 Pa.Super. 84, 423 A.2d 727 (1980). Accordingly, I find the *General Dynamics* case distinguishable. Pittsburgh-Corning's sixth claim is permissible under the governing law of contribution, be that law federal or state.

4. *Conclusion*

The United States has not argued that Pittsburgh-Corning's sixth claim for relief fails to satisfy the requirements laid out in *Scindia Steam Navigation Co., supra*, for stating a claim for negligence under section 5(b). That question is therefore not properly before me.

For the forgoing reasons, the United States' motion to dismiss or for summary judgment on Pittsburgh-Corning's sixth claim for relief shall be denied.

E. *Claims Brought Under the Tucker Act*

Counts three and four of Pittsburgh-Corning's third-party complaint seek relief for break of implied warranties.

Jurisdiction is based on those portions of 28 U.S.C. § 1346(a)(2) which relate to contract disputes with the United States. Count three alleges that, when it sold asbestos to Pittsburgh-Corning, the United States impliedly warranted the asbestos' safety and its fitness for its intended purpose. Count four alleges that, by issuing specifications which called for the use of asbestos-containing products at the Philadelphia Naval Shipyard, the United States impliedly warranted that the use of those products would be safe for shipyard workers. Pittsburgh-Corning argues that the United States breached both these implied warranties.

Neither of these counts states a claim over which this court has jurisdiction under the Tucker Act. That Act creates jurisdiction over claims regarding express contracts or contracts implied in fact; it does not extend to claims based on contracts implied in law. *Merritt v. United States*, 267 U.S. 338, 341, 45 S.Ct. 278, 279, 69 L.Ed. 643 (1925). Thus, in order to establish jurisdiction under the Tucker Act, Pittsburgh-Corning must show that the contracts on which it claims arise from the intent of the parties as shown by (1) their written agreements, or (2) their conduct. Obligations imposed as a matter of equity or public policy cannot be the basis for Tucker Act claims. *Maine I, supra*, 581 F.Supp. at 972.

Applying this rule to the implied warranty of safety which forms the basis for count three, it is clear that the warranty there alleged does not arise from any express or implied agreement on the part of the United States. The affidavits submitted by the United States establish that the United States sold asbestos "as is" and that the sales contracts expressly disclaimed all warranties. Affidavit of John G. Harlan, Jr. ¶ 19; Affidavit of Readus B. Long ¶ 4; Attachment A to Long Affidavit at ¶ 2. Pittsburgh-Corning has not contradicted the United States' evidence on this point, arguing instead that there was a "tacit understanding" that the United States guaranteed the asbestos' fitness for its intended use. The written sales

agreement shows, however, that all risks associated with the product's "fitness for any use or purpose" were shifted to the buyers of asbestos. Attachment A to Long Affidavit at ¶ 2. The parties to the sales contracts agreed to this distribution of product-related risks. Any implied warranty of safety or fitness for intended use must therefore arise, not from the parties' agreement, but from operation of nonconsensual rules of law. Such a claim does not satisfy the requirements of the Tucker Act.

The claims based on Government specifications fail for the same reason. The United States bought asbestos-containing products from Pittsburgh-Corning, but the specifications on which count four is based do not concern the makeup of those products. Rather, the specifications regard repair and construction work performed at the shipyard. There may be some basis for a claim by the contractors performing the repair work that the United States impliedly warranted that work performed according to its specifications would be safe for those involved. *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); *Ordnance Research v. United States*, 221 Ct.Cl. 641, 609 F.2d 462, 479 (1979). Such a warranty does not, however, comprise part of any agreement between the United States and the manufacturers which sold their asbestos-containing products to the United States. *In re All Asbestos Cases*, 603 F.Supp. 599, 610-11 (D.Hawaii 1984); *see also Correlated Development Corp. v. United States*, 214 Ct.Cl. 106, 556 F.2d 515, 523-25 (1977); *Housing Corp. of America v. United States*, 199 Ct.Cl. 705, 468 F.2d 922, 924 (1972); *Maine I, supra*, 581 F.Supp. at 973. Accordingly, Pittsburgh-Corning's fourth claim for relief also fails to satisfy the requirements of the Tucker Act. The contract counts of the third-party complaint shall be dismissed.

III. MOTIONS OF RAYMARK AND EAGLE-PICHER FOR LEAVE TO FILE THIRD-PARTY COMPLAINTS

The proposed third-party complaints of defendants Raymark and Eagle-Picher are in substance identical to Pittsburgh-Corning's third-party complaint. I have decided that all counts of Pittsburgh-Corning's complaint must be dismissed except for that part of count six which states a claim for negligence against the United States as vessel owner. My resolution of the motions of defendants Raymark and Eagle-Picher for leave to file third-party complaints against the United States will follow the same pattern. Both motions will be denied as to all claims except those for negligence against the United States in its capacity as vessel owner.

An appropriate order will follow.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EAGLE-PICHER INDUSTRIES, INC., P.O. Box 779 580 Walnut Street Cincinnati, Ohio 45201 (513) 721-7010, *Plaintiff,* v. UNITED STATES OF AMERICA c/o United States Attorney for the Eastern District of Pennsylvania, 3310 U.S. Courthouse 610 Market Street Philadelphia, Pennsylvania 19106 (215) 597-2556, *Defendant.*	CIVIL ACTION No. 85-4846

AMENDED COMPLAINT
(Damages—Tort)

Plaintiff Eagle-Picher Industries, Inc. ("Eagle-Picher") brings this civil action against defendant United States of America ("United States"), and alleges as follows:

JURISDICTION

1. This is a civil action for contribution, noncontractual indemnification, and other damages for the full amount of losses incurred by Eagle-Picher as a result of its defense and settlement of the civil action captioned *Charles Press, et al. v. Johns-Manville Corp., et al.*, No. 4802 (Case No. 8) (Pennsylvania Court of Common Pleas, Philadelphia County, January Term, 1979) (hereinafter "underlying case") including any and all reasonable costs, expenses, disbursements, attorneys' fees and interest thereon.

2. On February 6, 1985, pursuant to 28 U.S.C. § 2675(a), Eagle-Picher presented an administrative claim, demanding payment of $69,356.31 for losses which it incurred in the defense and settlement of the underlying case, to the Department of the Navy, the General Services Administration, the Department of Justice, the Department of Health and Human Services, the Surgeon General of the United States, the Department of Defense, the Department of Labor, the Department of Transportation, and the United States Public Health Service. The United States failed to make final disposition of Eagle-Picher's administrative claim within six months after its submission to these agencies. Accordingly, pursuant to 28 U.S.C. § 2675(a), Eagle-Picher deems the United States' failure to make a final disposition of its claim within six months to be a final denial of that claim.

3. This Court has jurisdiction over this action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) 2671-2680 ("FTCA"). Alternatively, this Court has jurisdiction under the general admiralty and maritime law of the United States, 28 U.S.C. 1333; the Suits in Admiralty Act, 46 U.S.C. §§ 741-752; the Public Vessels Act, 46 U.S.C. §§ 781-790; the Admiralty Extension Act, 46 U.S.C. § 740; and 28 U.S.C. § 1331.

4. Venue is proper in this Court by virtue of 28 U.S.C. § 1402(b).

PARTIES

5. Plaintiff Eagle-Picher is a corporation organized under the laws of the State of Ohio with its principal place of business in Cincinnati, Ohio.

6. In 1979, Eagle-Picher was named as one of 22 defendants in the underlying case. In that litigation, plaintiffs Charles and Thelma Press asserted claims against Eagle-Picher and its 21 co-defendants, alleging (i) that, in the course of his 38-year employment by the United States Navy ("Navy") at the Philadelphia Naval Shipyard ("PNS"), Mr. Press was exposed to Super-66, an asbestos-containing insulation product manufactured and sold by Eagle-Picher, and other insulation products manufactured or sold by others; (ii) that, as a result of such exposure, he had contracted asbestos-related diseases—"including asbestosis, scarred lungs, respiratory disorders, and the risk of mesothelioma and other cancers, some or all of which may be permanent and/or fatal"; and (iii) that, as a result of Mr. Press's injury, Mrs. Press suffered loss of consortium and other harm.

7. On February 22, 1983, Mr. Press was diagnosed as having pleural effusion and asbestosis: on July 27, 1983, Mr. Press was diagnosed as having asbestosis and mesothelioma; and, on September 2, 1983, Mr. Press died of malignant mesothelioma, asbestosis, and respiratory failure. Mrs. Press amended her complaint accordingly.

8. Under special rules approved by the Supreme Court of the Commonwealth of Pennsylvania for use in all asbestos-related personal-injury litigation,[1] a nonjury trial was conducted in the underlying case on January 31 and February 1, 1984. At that time, Eagle-Picher and seven other

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[1] Under those rules, an initial nonjury trial is conducted and a verdict announced; if a party is dissatisfied with that verdict, he may "appeal" the verdict and demand a jury trial *de novo*. *See Pittsburgh Corning Corp. v. Bradley*. 453 A.2d 314, 315-16 n.2 (Pa. 1982).

defendants were held jointly and severally liable to Mrs. Press in the amount of $575,000.00 ($475,000 in what had become a survivor's action, and $100,000 for loss of consortium). Thereafter, on April 13, 1984, Eagle-Picher reasonably settled the underlying case, agreeing to pay Mrs. Press $67,824.40. Mrs. Press executed a release of all claims against Eagle-Picher on April 17, 1984. In total, Eagle-Picher incurred $69,356.31 in legal expenses, costs and disbursements in defending and settling the underlying asbestos-related lawsuit.

9. Defendant United States is a sovereign state which has consented to be sued under the Federal Tort Claims Act.

10. The liability of the United States to Eagle-Picher for contribution to and indemnity for Eagle-Picher's defense and settlement of the underlying case arises, *inter alia*, from its wrongful and negligent acts and/or failure to act in requiring asbestos in insulation products used in the construction and repair of naval vessels; in failing to adopt and enforce adequate measures to protect the health and safety of Mr. Press and other workers at PNS; in failing to warn Mr. Press and other shipyard workers of the hazards of exposure to asbestos fibers despite its substantial knowledge of the potential health hazards of exposure to asbestos-containing insulation products; in failing to inform Mr. Press of the results of his x-rays, despite his having been screened for respiratory ailments by the United States from 1941-1978; and in failing to inform Eagle-Picher of the conditions under which its insulation product would be used at shipyards. The negligent and wrongful acts and omissions of the United States (i) proximately caused the asbestos-related injuries alleged by plaintiff in the underlying case, and (ii) proximately caused Eagle Picher to incur the damages in the defense and settlement of that case.

STATEMENT OF THE CLAIM

A. Design and Specification of Thermal Insulation Products by the United States

11. In the underlying case, plaintiffs alleged that Mr. Press was exposed to asbestos in connection with the application, use, and removal of Eagle 66 (later Super-66), Eagle-Picher's high-temperature thermal-insulation cement, and other manufacturers' asbestos-containing insulation products.

12. At least as early as 1931, and continuing throughout the period relevant to this claim, the federal government designed, promulgated and contractually enforced detailed Navy and military specifications governing Super-66, which Eagle-Picher supplied to PNS for the construction and repair of United States naval vessels. Those detailed and mandatory specifications set forth the ingredients, materials and mixtures to be used in, and the physical properties required of, Super-66. At all times, responsibility for establishing, approving and issuing the detailed specifications remained with, and was exercised by, the United States.

13. At all pertinent times, the specifications governing Super-66, which Eagle-Picher supplied to the United States, expressly required the use of asbestos as a principal ingredient.

B. Eagle-Picher's Compliance with Specifications

14. Eagle-Picher initially undertook to formulate and manufacture Eagle 66 to comply with existing government specifications and continued to do so in its manufacture of Super-66. At all times relevant to this complaint, Super-66, which Eagle-Picher supplied for use in the construction and repair of United States naval vessels, complied at all times with the Government specification referenced in the contract or in effect at the time of procurement. The

United States actively participated in the design and development of Super-66. The United States also extensively tested Super-66 at the Naval Engineering Experiment Station and at other facilities, and regularly issued certificates of approval for it.

15. Super-66 also met the rigid inspection and testing requirements set forth in governing federal contract specifications to determine whether at the time of procurement the product complied with applicable government specifications. Finally, the Government regularly reviewed and approved Eagle-Picher's quality-control program for the manufacture of Super-66.

C. United States' Knowledge of Asbestos Hazards

16. The federal government required Eagle-Picher to produce Super-66 for use at PNS even though the Government knew asbestos to be hazardous to human health. At least as early as 1918, the Government published a guide to occupational hazards and diseases which included information on the health hazards associated with asbestos. In 1933, the Government stated in an official occupational health bulletin that "our knowledge of well-known health hazards has been enriched. To mention only a few, exposure to asbestos dust . . . has been thoroughly studied." The 1933 bulletin concluded that asbestos has been definitiely determined [to produce] a lung fibrosis under existing industrial conditions."

17. Prior to and during World War II, the United States was fully aware of—and, indeed, responsible for—the hazardous working conditions prevailing in government shipyards throughout the United States generally and at PNS specifically. At least by 1939, the Navy was specifically aware of the hazards of asbestos dust exposure in shipbuilding and ship-repair operations at its own shipyards. In his 1939 annual report to the Secretary of the Navy, for example, the Surgeon General of the Navy specifically recognized that: "Asbestosis is an industrial disease of the

lungs incident to the inhalation of asbestos dust for prolonged periods." He concluded that federal shipyard workers were being exposed to unsafe levels of asbestos dust and he recommended the installation of exhaust blowers as a protective measure against the hazards of asbestos. The Surgeon General characterized asbestos pipecovering and insulation work as "hazardous occupations." Two years later, in 1941, the Commander in Charge of the Navy's Division of Preventive Medicine conceded in a letter to the Surgeon General of the Navy that asbestos control measures at naval shipyards were inadequate: "Asbestosis. We are having a considerable amount of work done in asbestos and from my observations I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy yards." In 1943, on the basis of a nationwide survey of government and contract shipyards, the United States promulgated safety and health regulations governing the handling and use of asbestos and asbestos-containing products during shipbuilding, ship-repair and ship insulation ripout operations. Those regulations, however, were neither followed nor enforced by the United States.

18. From 1945 until the late 1960's, the Government took few precautions to protect shipyard workers from asbestos exposure. The Bureau of Medicine and Surgery (BUMED) did not formally adopt the 5 million p.p.c.f. threshold limit value (TLV) for asbestos dust—first recommended by the Public Health Service ("PHS") in 1938—until 1955. Despite this dust level standard, twelve years later the PHS reported that most shipyards still failed to meet this standard and, in fact, some shipyards had dust concentrations as high as 52.9 million p.p.c.f. Indeed, in 1972—seventeen years after the 5.0 million p.p.c.f. standard was set—the occupational Health and Safety Division of the Naval Ship Systems Command stated that the 5.0 million p.p.c.f. standard "is not necessarily safe but is reasonable to achieve and is less hazardous than higher

concentrations." But the Navy did not formally require workers exposed to asbestos to be placed in a medical surveillance program to monitor known health problems from such exposure until 1960, and the Coast Guard did not implement a program until 1979.

19. In 1965, Dr. Irving Selikoff, Director of the Environmental Sciences Laboratory at Mt. Sinai Hospital in New York City, reported that "[a]sbestosis and its complications are significant hazards among insulation workers in the United States at this time." He thereafter, in 1968, testified before Congress and met with representatives of the Public Health Service ("PHS"), BUMED, and the Department of Labor ("DOL") and reported to them that autopsies of former shipyard workers revealed an unusual incidence of asbestosis.

20. In 1970, Admiral Hyman G. Rickover sent a letter to NAVSHIPS in which he acknowledged that "many years of medical research have firmly established the serious effects of inhaled asbestos fibers reaching the lungs and resulting in lung cancer and asbestosis. Although alternate materials have been available for years, NAVSHIPS has not taken action to 'prohibit' use of high asbestos content materials and insulation."

21. The Government knew of the causal relationship between the exposure of shipyard workers to asbestos-containing products and asbestosis and other respiratory illnesses. Nevertheless, in 1971, the General Services Administration ("GSA") advised the Navy that it had substantial inventories of material containing asbestos and asked the Navy not to eliminate the need for such materials until GSA's stock was exhausted. And in a 1979 study, the same year Mr. Press was forced to retire from PNS, the Comptroller General concluded that the Navy was failing to take adequate measures to protect employees in its shipyards from the *foreseeable* effects of exposure to asbestos in shipyards.

22. Prior to and during Mr. Press's employment at PNS, the Government conducted more than 100 confidential safety and health surveys at Government and Navy contract shipyards. These surveys, which included comprehensive audits of work conditions in these shipyards, revealed that shipyard workers were being exposed to concentrations of asbestos dust far in excess of safe levels and that the Government and its shipyards were failing to implement required asbestos control measures. Notwithstanding that knowledge, the United States restricted the disclosure of information relating to health and safety surveys and audits of Government and contract shipyards. The Government restricted and limited the disclosure and dissemination of such information by classifying reports and documents containing such information and by prohibiting government shipyards from disclosing pertinent information. And the Government even restricted the distribution of Mr. Press's x-rays and medical evaluations despite the clear medical evidence that Mr. Press suffered progressively diminished pulmonary function.

23. At all times relevant to this complaint, the United States had extensive knowledge of the health risks associated with exposure to asbestos. Despite that knowledge, the Government continued to design and promulgate—and to require strict compliance with—contract specifications mandating the use of asbestos; to regulate and oversee the use of asbestos-containing products in a negligent and wrongful manner; to restrict and limit disclosure of information that shipyard workers were being exposed to concentrations of asbestos in excess of recognized safe levels; and knowingly to cause the exposure of thousands of shipyard workers—including Mr. Press—to unsafe concentrations of airborne asbestos dust.

D. Supervision and Control of Federal Shipyards by the United States

24. The federal government at all pertinent times owned and operated PNS and exercised supervision and control

over the application, installation, use and removal of asbestos-containing insulation products at PNS.

25. The United States was responsible for the safety and welfare of all shipyard workers, including Mr. Press, engaged in the construction and repair of government naval vessels. The United States established safety regulations, standards, and procedures designed to protect workers from the potential dangers of exposure to asbestos.

26. Agents and employees of the United States were at all times present at PNS and were responsible for enforcing the safety regulations, standards and procedures adopted by the United States for the handling of asbestos-containing products.

27. Eagle-Picher, by contrast, was not present at PNS, had no responsibility for the safety of the workers, and had no control—nor could it have had control—over the use of Super-66, its high-temperature thermal-insulation cement, the manner in which the work was performed, or the enforcement of safety regulations, standards, and procedures of the United States. Mr. Press was not employed by Eagle-Picher, nor was he ever in any way associated with Eagle-Picher.

28. At no time did Eagle-Picher have reason to believe that the United States would permit use of Super-66 provided by Eagle-Picher in a manner which would endanger the health of Mr. Press and other shipyard workers at PNS.

E. Conditions at PNS and Mr. Press's Injuries

29. Charles Press first worked at PNS as a sheet-metal worker from November of 1941 until September of 1943, when he enlisted in the Navy. Following his tour of duty, he returned to PNS as a civilian employee in April of 1946, and remained at PNS until August 28, 1979, the rest of his working life.

30. During the entire course of his employment at PNS, Mr. Press was exposed daily to asbestos products and to dangerously high concentrations of airborne asbestos dust. Mr. Press regularly worked in machinery spaces and other compartments on board ships in close proximity to operations involving the ripout of asbestos-containing insulation. On occasion, he was also required to ripout asbestos from insulation-covered piping systems. The Government failed both to warn of and to protect against the hazards to Mr. Press which it knew to exist due to this activity.

31. The Government officials specifically responsible for the health and safety of Mr. Press and other shipyard workers at PNS were well aware of the hazards of occupational exposure to asbestos at least as early as 1941. Dr. Victor Kindsvatter, a government-trained and -employed industrial hygienist, was first stationed at PNS in 1942. Dr. Kindsvatter knew at least as early as 1941 that exposure to asbestos dust caused asbestosis. He was also fully aware that the use of respirators and other protective devices would prevent shipyard workers from inhaling asbestos dust and, consequently, prevent their contracting asbestosis and other asbestos-related disease. Neither Dr. Kindsvatter nor any other federal official or employee at PNS informed Mr. Press or any of his co-workers that their health was at risk or that effective preventive measures were available.

32. Government officials at PNS were also specifically aware of the deplorable conditions to which Mr. Press and other shipyard workers were being exposed. The PNS Industrial Hygiene Division, for example, periodically surveyed airborne asbestos particles at the shipyard and on board ships to determine the extent of the threat to workers' health and safety. Those studies, which were instituted sometime in the early 1940's—and which occurred approximately once every other month—measured asbestos dust concentrations against the 5 million p.p.c.f. threshold limit value ("TLV") recommended by the Public Health

Service in 1938. They consistently revealed concentrations of asbestos dust far in excess of the 5 million p.p.c.f. TLV. Indeed, as late as 1955, the readings during at least one ripout procedure were "so high that [the industrial hygienists] couldn't read them." The Government did not implement available protective measures to provide a reasonably safe workplace. Working conditions remained deplorable—and dangerous—throughout the period of Mr. Press's employment.

33. PNS officials were specifically aware of the effect of those deplorable conditions upon the health and safety of individual shipyard workers—including Mr. Press. At the time of Mr. Press's initial employment at the shipyard in 1941, the Government required each shipyard employee to have a chest x-ray taken once a year, in the month of his birthday. Although he was probably x-rayed throughout the period of his employment at PNS, Mr. Press was regularly x-rayed at the PNS Dispensary from the early 1950's until 1973, when, for budgetary reasons, the Navy discontinued taking annual worker x-rays. Never was Mr. Press told of the results of his own x-rays during that period of time.

34. A voluntary program of x-rays and examinations was instituted in 1973, and Mr. Press participated in that program. Thus, the Government had monitored Mr. Press's pulmonary functions from 1941 through 1979. Although the program was specifically designed to screen PNS workers for asbestos-related diseases, no PNS official ever informed Mr. Press or his co-workers of that fact. Mr. Press would go "over for an x-ray and they would put us through this breathing test and they would take these readings and that's all. We weren't told anything." He stated, "well, the only thing I thought, maybe, that it might have been T.B.," and he explained: "I thought it was, you know, to test on things. What they were checking for, if they find it, they would have told us."

35. Mr. Press's family doctor also apparently relied upon the Navy's x-ray program. Although Mr. Press diligently saw his doctor once a year, he never received a chest x-ray because "all my chest x-rays were done at work."

36. At least as early as 1973, PNS officials were specifically aware that Mr. Press was suffering from asbestos-related lung impairment, as revealed by the annual reports of the PNS Dispensary:

- PNS Dispensary Report of 26 July 1973: "Pleural scarring along lat. borders of chest."
- PNS Dispensary Report of 15 July 1975: "No change since 7/26/73: Pleural scarring "L" mid-lung field."
- PNS Dispensary Report of 2 Aug 1976: "No interval change from 7/15/75."
- PNS Dispensary Report of 11 July, 1977: "Pleural thickening lat. chest wall."
- PNS Dispensary Report of 11 July, 1978: "Diffuse interstitial lung markings. Pleural scarring, lateral chest wall [with] associated calc[ification]."

None of these findings was ever communicated to Mr. Press.

37. Mr. Press finally discovered that he was a participant in an asbestos-related program sometime around 1977. In that year, a nurse at PNS sent him to see a Dr. Theodos. The nurse gave him his medical records in a sealed envelope to carry to his appointment. Dr. Theodos returned those records and his (Dr. Theodos's) report to Mr. Press. Mr. Press stated that Dr. Theodos's report "concerned me so I made a copy." That was the first time he ever heard of or saw the word "asbestosis." When Mr. Press went back to the shipyard, he gave the report to a Dr. Duca, who explained to Mr. Press in layman's terms

that he suffered from some form of lung impairment. Dr. Duca never mentioned the term "asbestosis."

38. In late 1977, because of his respiratory impairment, PNS gave Mr. Press a permanent restriction. In August of 1979, he retired.

39. On February 15, 1983, Mr. Press was admitted by Dr. Taggart, his family doctor, to the Albert Einstein Medical Center; he was discharged on February 22, 1983. The discharge diagnosis was pleural effusion—etiology undetermined—and asbestosis. On July 27, 1983, Mr. Press was readmitted to the Medical Center under Drs. Cohen and Solit. The admitting diagnosis was asbestosis and mesothelioma. On August 1, 1983, Dr. Solit performed a right thoracotomy. The whole lung was described as encased by tumors, shown to be mesothelioma. Post-operatively, Mr. Press never recovered, and he died on September 2, 1983. The final diagnosis was malignant mesothelioma, asbestosis, and respiratory failure.

F. Eagle-Picher's Damages

40. As a direct result of the underlying case, Eagle-Picher suffered losses in the amount $69,356.31, which figure includes the amount paid in settlement of the claim, and all amounts expended by way of costs, expenses, insurance, handling charges and premiums, attorneys' fees, the cost of executive time, and administrative expenses incurred in defending and settling the action.

CAUSE OF ACTION

41. Eagle-Picher repeats and realleges the allegations set forth in Paragraphs 1 through 40 of this complaint.

42. Throughout Mr. Press's employment at PNS he was exposed to unreasonably high concentrations of asbestos dust aboard naval and merchant vessels owned by the United States.

43. At all times relevant to this complaint, Eagle-Picher's Super-66 insulation product used in the construction or repair of naval vessels at PNS was required by regulation and/or by contract to comply with government contract specifications that mandated the use of asbestos. Those specifications were promulgated by one or more departments or agencies of the United States.

44. The Government designed, adopted, and enforced compliance with specifications requiring the use of asbestos and required that Super-66 procured from Eagle-Picher comply with those specifications even though the Government knew that exposure to asbestos was hazardous to human health. The Government's conduct in designing, adopting, and enforcing compliance with such specifications was wrongful and negligent.

45. Pursuant to the Government's requirement that Eagle-Picher comply with all applicable specifications, Eagle-Picher supplied to PNS Super-66, an asbestos-containing insulation product, that complied with the Government's specifications in every respect.

46. Mr. Press's respiratory impairment—because of which he was given a permanent restriction at PNS in 1977—forced him to retire from his job at PNS in 1979. Prior to his retirement, the Government gave him *no* information about the nature of his respiratory impairment—despite the Government's having monitored his respiratory functions as part of its *mandatory* chest x-ray program from at least 1941 through 1973, and its voluntary program from 1973 until 1979, and despite the Government's own PNS Dispensary Reports which indicated the presence of pleural scarring" and "calcification," conditions consistent with a diagnosis of asbestosis. The Government thus willfully, wantonly, and in reckless disregard of Mr. Press's health failed to take steps to carry out the follow-up procedures mandated by its own medical screening pro-

gram either by treating Mr. Press or advising him to seek treatment elsewhere.

47. Subsequent to Mr. Press's retirement from employment at PNS in 1979, the United States willfully failed to inform Mr. Press of the results of his x-rays, despite his 1978 x-ray which clearly indicated a condition consistent with a diagnosis of asbestosis.

48. Between August 1979—the date of Mr. Press's retirement from PNS—and September 1983—the date of Mr. Press's death—the Government (i) took no steps to inform Mr. Press of the results of his x-rays; (ii) took no steps to treat Mr. Press for his respiratory impairment; (iii) took no steps to encourage Mr. Press to seek treatment elsewhere; and (iv) took no steps to involve Mr. Press in any post-employment screening program.

49. Between August 1979—the date of Mr. Press's retirment from PNS—and September 1983—the date of Mr. Press's death—the Government knew of the causal connection between shipyard worker exposure to asbestos-containing insulation products and asbestosis and other respiratory impairments. By virtue of its owning and controlling the vessels, upon which Mr. Press worked at PNS, and by virtue of its role as Mr. Press's employer, the Government had and further assumed duties to warn Mr. Press and other shipyard workers about any and all dangers associated with exposure to asbestos-containing insulation products to which they had been subjected once the Government because aware of them, either before, during or after their employment at PNS.

50. The Government willfully failed to inform Mr. Press of those dangers once it became aware of them after Mr. Press retired from PNS, and thus the Government breached its duties to Mr. Press.

51. The United States owned PNS and the naval and other vessels upon which Mr. Press and other shipyard workers performed work involving exposure to asbestos.

52. As the owner of those naval and other vessels constructed and repaired at PNS, the United States owed duties and responsibilities to Mr. Press (i) to maintain those vessels in a reasonably safe manner; (ii) to prevent or eliminate unreasonable risks of harm to Mr. Press; (iii) to exercise reasonable care to protect Mr. Press aboard such vessels; (iv) to warn Mr. Press of known dangers such as dangerous concentrations of asbestos dust on such vessels; (v) to inform Mr. Press of the threat to his health from his having worked at PNS as soon as that information became known to the Government. The United States breached those duties.

53. As owner of those naval and other vessels constructed and repaired at PNS, the United States (i) negligently and wrongfully promulgated specifications for insulation products that mandated the use of asbestos; (ii) negligently and wrongfully failed to provide for the health and safety of its own workers, including Mr. Press; (iii) negligently and wrongfully failed to provide Mr. Press and other shipyard workers with warnings or information regarding the health hazards of exposure to asbestos; (iv) negligently and wrongfully failed to promulgate health and safety regulations, standards or procedures; (v) negligently and wrongfully failed to enforce those health and safety regulations, standards, and procedures the Government had recognized and adopted ostensibly to limit exposure to asbestos at Government shipyards; (vi) negligently and wrongfully failed to implement or to enforce requirements pertaining to health and safety; (vii) negligently, wrongfully and willfully restricted and limited the dissemination of information, thereby denying access to such information to Mr. Press and his family, to other shipyard workers, to Eagle-Picher and to the public, concerning the existence and extent of the exposure of shipyard workers to concentrations of asbestos dust which exceeded recognized safe limits and the failure of government shipyards—including PNS—to implement asbestos control measures; (viii)

negligently and wrongfully failed to ensure that the Super-66 manufactured and/or supplied by Eagle-Picher was not misused or used in a fashion which would endanger the health and safety of Mr. Press and other shipyard workers; (ix) negligently and wrongfully breached its statutory and regulatory duties to study, monitor, inspect, and investigate the conditions under which Mr. Press and other shipyard workers were exposed to asbestos at PNS and to enforce compliance with health and safety standards and requirements which the Government itself had promulgated; (x) negligently, wrongfully and willfully concealed from Mr. Press the results of his x-rays, which indicated progressively diminished respiratory function; (xi) negligently and wrongfully failed to intervene to protect Mr. Press and other shipyard workers from risks, of which the Government was aware, posed by exposure to asbestos and asbestos products; (xii) negligently and wrongfully failed to perform duties it had assumed to protect the health and safety of Mr. Press and other shipyard workers.

54. The injuries suffered by Mr. Press in the underlying case and by Eagle-Picher in defending and settling that case occurred as the direct and proximate result of the Government's negligent, wrongful and willful acts and omissions.

55. In its capacity as owner of the naval and other vessels upon which Mr. Press worked, the United States had direct knowledge or knew to a substantial certainty that harm to Mr. Press and other shipyard workers from exposure to asbestos or asbestos-containing products would be caused by the acts and omissions described above and identified in paragraph 53.

56. By reason of the foregoing, Eagle-Picher incurred $69,356.31 in damages. Those injuries were caused solely by the wrongful and negligent acts and omissions of the United States. Eagle-Picher is accordingly entitled to indemnification, contribution, apportionment and/or damages

from the United States, plus costs, disbursements and attorneys' fees, and interest thereon.

PRAYER FOR RELIEF

WHEREFORE Eagle-Picher prays that this Court enter judgment against the United States and in favor of Eagle-Picher for:

(1) the full amount of the settlement and legal costs, including expenses, costs and disbursements, incurred by Eagle-Picher in defending and settling the underlying case, in the amount of $69,356.31, plus interest thereon;

(2) the costs of this litigation, including reasonable attorneys' fees; and

(3) such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ JOE G. HOLLINGSWORTH
JOE G. HOLLINGSWORTH

/s/ EDWARD M. FOGARTY
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Dated: January ___, 1986

CERTIFICATE OF SERVICE

I, Gary I. Rubin, hereby certify that a true and correct copy of the foregoing Amended Complaint in *Eagle-Picher Industries, Inc. v. United States*, was served on the following in the manner described below, this 21st day of January, 1986:

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/s/ GARY I. RUBIN
GARY I. RUBIN

No. 88-239

In the Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a manufacturer of asbestos products found liable to a shipyard worker who contracted asbestos-related diseases may bring a third-party tort suit seeking contribution and indemnity from the United States, the shipyard worker's employer and the owner of the vessels on which he worked.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 846 F.2d 888. The opinion of the district court (Pet. App. 22a-46a) is reported at 657 F. Supp. 803.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1988 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on August 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, Charles Press, a sheetmetal worker at the Philadelphia Naval Shipyard for 35 years, died from asbestos-related diseases. His widow subsequently was awarded $575,000 from petitioner and six other manufac-

turers of asbestos insulation whose products had been used at the shipyard. Petitioner settled with Mrs. Press for $67,824.40, and then filed this action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, in the United States District Court for the Eastern District of Pennsylvania seeking contribution and indemnity from the United States, Mr. Press's employer. Pet. App. 23a. In light of that court's prior decision in *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119 (1984) (*reprinted in* Pet. App. 50a-90a), where it allowed a third-party action similar to that presented here to go forward under 33 U.S.C. 905(b) against the United States in its capacity as the owner of the vessels on which the injured employee worked, petitioner sought recovery only on that basis (Pet. App. 24a-27a).

Petitioner thus essentially adopted the theory of the *Colombo* case, and did not contest aspects of that decision's reasoning which barred liability other than under Section 905(b). The court in *Colombo* first noted that under the Pennsylvania Workmen's Compensation Act, workers' compensation benefits are the exclusive remedy which injured employees may obtain from their employers for injuries suffered in the course of their employment (Pet. App. 59a). Applying the FTCA provision making the United States liable "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674), and noting both the exclusive liability provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8116(c)[1] (Pet. App. 60a) and the

[1] Section 8116(c) provides that the government's payment under the FECA are "exclusive and instead of all other liability of the United States • • • to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States."

general rule of Pennsylvania law that a party is not liable on a third-party action unless it is liable on the underlying claim (*id.* at 70a), the court dismissed all of the third-party claims in *Colombo* except that raised under the vessel-owner liability provision of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. 905(b).

Section 905(b) provides that a person injured "by the negligence of a vessel" may obtain recovery.[2] Since "an employee of a private shipyard would be able, under the LHWCA, to maintain an action for negligence against the shipyard in its capacity as vessel owner" (Pet. App. 75a), and the private shipyard would therefore be subject to third-party suits by parties found liable in tort to the employee,[3] the district court held in *Colombo* that the manufacturers of asbestos products could proceed with their third-party action against the United States in its capacity as vessel owner.

2. In this case, the United States argued in the district court against the Section 905(b) "vessel owner" theory of liability which the court recognized in *Colombo*. It relied primarily on the decisions of the First Circuit in *Drake* v. *Raymark Indus., Inc.*, 772 F.2d 1007 (1985), cert. denied,

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[2] This Court held in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), that an employer covered by the LHWCA may be sued by its employees, as a vessel owner under Section 905(b), even if it is not subject to suit under Section 905(a), in its capacity as an employer, due to the existence of an exclusive workers' compensation remedy.

[3] Congress amended Section 905(b) in 1984 to provide that employees may not sue their employers under that provision in their capacity as owner of the vessel on which they worked. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1641. However, that amendment does not apply to cases such as this where the injury occurred prior to the date of the amendment. Pet. App. 74a-75a n.7.

476 U.S. 1126 (1986), and *In re All Maine Asbestos Litigation* (*PNS Cases*), 772 F.2d 1023 (1985), cert. denied, 476 U.S. 1126 (1986), where the court held that Section 905(b) provides a cause of action to persons injured on vessels only if their claims would be cognizable in admiralty. To establish admiralty jurisdiction under the test set forth in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 268 (1972), a plaintiff must show both that he was injured "on or over navigable waters" (a situs test), and "that the wrong [bore] a significant relationship to traditional maritime activity" (a nexus test). Like the other seven courts of appeals that have considered the matter (Pet. App. 16a), the First Circuit held that asbestos-related claims by land-based shipyard workers do not have a significant relationship to traditional maritime activity (772 F.2d at 1014-1016).[4] Since shipyard workers thus could not bring their own claims under Section 905(b) for injuries caused by exposure to asbestos, the First Circuit reasoned that there was no basis for third-party claims by manufacturers of asbestos products against public or private shipyards.[5]

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[4] In addition to the First Circuit, the Second (*Keene Corp.* v. *United States*, 700 F.2d 836, 843-845, cert. denied, 464 U.S. 864 (1983)), Third (Pet. App. 15a-18a)), Fourth (*Oman* v. *Johns-Manville Corp.*, 764 F.2d 224, 230-232 (en banc), cert. denied, 474 U.S. 970 (1985)), Fifth (*Lowe* v. *Ingalls Shipbuilding*, 723 F.2d 1173, 1187-1190 (1984)), Ninth (*Myhran* v. *Johns-Manville Corp.*, 741 F.2d 1119 (1984), Eleventh (*Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 786 (1984)), and Federal (*Lopez* v. *A.C.&S., Inc.*, No. 87-1543 (Sept. 28, 1988), slip op. 20) Circuits have so held.

[5] It is settled that third-party tort suits against LHWCA employers are barred when those employers may not be sued directly by the underlying plaintiffs, their employees, as 33 U.S.C. 905(a), the LHWCA's exclusivity provision, states. See, *e.g.*, *Drake* v. *Raymark Indus.*, 772 F.2d at 1019-1022; *Ketchum* v. *Gulf Oil Corp.*, 798

The district court below rejected the reasoning of *Drake* and *All Maine Asbestos Litigation*, and instead relied primarily on the Fifth Circuit's decision in *Hall* v. *Hvide Hull No. 3*, 746 F.2d 294, 303, cert. denied, 474 U.S. 820 (1985), where the court held that employees could bring actions under Section 905(b) whether or not their claims had a significant relationship to a traditional maritime activity.[6] It thus concluded that shipyard workers need not establish that their work had a traditional maritime nexus in order to pursue an action under Section 905(b) (Pet. App. 36a-44a), and denied the government's motion to dismiss petitioner's third-party claims (*id.* at 45a). The court certified its order for interlocutory review (*id.* at 19a-21a).

3. The court of appeals reversed (Pet. App. 1a-18a), basing its decision primarily on 33 U.S.C. (Supp. IV) 903(b), which excludes federal employees from the LHWCA's coverage.[7] Since Mr. Press, as a federal employee, was barred by Section 903(b) from bringing suit under Section 905(b), and, under the LHWCA and Pennsylvania law, third-party actions may not be maintained against parties who are not directly liable (Pet. App. 7a), the court held that "[t]his express congressional exclusion of federal workers from LHWCA coverage precludes

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F.2d 159, 161-163 (5th Cir. 1986); *Zapico* v. *Bucyrus-Erie Co.*, 579 F.2d 714, 719 (2d Cir. 1978); *White* v. *Johns-Manville Corp.*, 662 F.2d 243, 247 (4th Cir. 1981); *Graco, Inc.* v. *Colberg, Inc.*, 162 Cal. App. 3d 322, 330-335, 208 Cal. Rptr. 461, 470-473 (1984), cert. denied, 474 U.S. 820 (1985).

[6] The en banc Fifth Circuit recently overruled *Hall* in *Richendollar* v. *Diamond M. Drilling Co.*, 819 F.2d 124, 125-126 (1987), cert. denied, No. 87-504 (Nov. 9, 1987).

[7] Section 903(b) provides that "[n]o compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof."

[petitioner] from using the FTCA to accomplish indirectly what federal employees could not accomplish directly" (*id.* at 13a).

The court also stated that its decision "could have been based" on FECA's exclusivity provision, 5 U.S.C. 8116(c) (Pet. App. 11a n.8). Although under *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), Section 8116(c) does not directly bar third-party suits against the government based on an injury to a government employee, the court below concluded that "the immunity it creates against suits by federal employees is a significant circumstance that we would have to consider under the FTCA" (Pet. App. 11a n.8). In other words, because the government may not be sued in tort by its employees on account of Section 8116(c) of the FECA, the United States is properly analogized under the FTCA to a private party that is immune from tort suits by its employees. Where, as under Pennsylvania law, a party is immune from third-party suits if it is not directly liable, the United States should not be subject to such actions pursuant to the FTCA.

ARGUMENT

1. There is no conflict in the courts of appeals on the question presented by this case—whether manufacturers of asbestos products may bring third-party suits against the government in its capacity as the owner of the vessels on which its shipyard employees were injured by exposure to asbestos. Thus far, three courts of appeals have considered the issue, and all three have correctly concluded that the government is immune from such suits.

Like the First Circuit in the *All Maine Asbestos Litigation*, the Federal Circuit recently concluded that "[n]egligence claims under section 905(b)[] are those covered by

federal maritime principles." *Lopez* v. *A.C.&S., Inc.*, No. 87-1543 (Sept. 28, 1988), slip op. 23. Those courts are correct. The common law of admiralty recognized various actions available to shipyard workers, including an absolute liability action for "unseaworthiness" by a longshoreman injured on a vessel lying in navigable waters. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). Congress enacted Section 905(b) in 1972 to replace that unseaworthiness action with a negligence action comparable to that available to longshore and harbor workers at common law. As the First and the Federal Circuits have concluded, Congress did not intend that negligence action to extend beyond the scope of admiralty jurisdiction. Rather, like the unseaworthiness claim and the common law negligence claim, a plaintiff may bring suit under Section 905(b) only if the suit satisfies the jurisdictional requirements of admiralty law.[8] And, as the court below noted, all of the courts of appeals to consider the matter have concluded "that asbestos-related claims by land-based ship workers bear no significant relationship to traditional maritime activity" (Pet App. 16a), so there is no basis for such claims under Section 905(b).

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[8] *Holland* v. *Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir. 1981), cert. denied, 455 U.S. 919 (1982) (§ 905(b) did not "enlarge the traditional jurisdiction of admiralty over maritime torts"); *Christoff* v. *Bergeron Indus., Inc.*, 748 F.2d 297, 298 (5th Cir. 1984) (§ 905(b) "neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty"); and *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 787 n.9 (11th Cir. 1984) (§ 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties"). While the Fifth Circuit appeared to reach a contrary conclusion in *Hall* v. *Hvide Hull No. 3*, that decision was explicitly overruled in *Richendollar*.

The reasoning relied on by the court below—looking primarily to Section 903(b) of the LHWCA and secondarily to Section 8116(c) of the FECA—is also correct. Congress has made it doubly clear that federal shipyard workers may not bring suit against the United States under Section 905(b). Federal employees are exempted from coverage under the LHWCA by Section 903(b), and they are also expressly prohibited from suing the United States by Section 8116(c) of the FECA. In determining whether the United States is liable under the FTCA, one must look to the liability of "a private individual under like circumstances." Those "like circumstances" include those provisions which make clear that the United States has no direct liability to the injured employee. Thus, the United States should be analogized to a private shipyard owner whose employees have no cause of action against it. There would be no basis for a direct claim by an employee against an employer protected from direct suit by operation of law, and hence no basis for a third-party claim, under applicable Pennsylvania law.[9]

2. Apparently recognizing that there is no conflict in the courts of appeals on the question presented,[10] peti-

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[9] The decision of the court below is supported by *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952), and *Patterson* v. *United States*, 359 U.S. 495, 496 (1959), where this Court held that federal seamen who have a remedy under the FECA may not sue the United States under the Public Vessels Act or the Suits in Admiralty Act, even though FECA's exclusivity provision does not apply to "a member of a crew of a vessel" (5 U.S.C. 8116(c)). Those decisions show that Congress did not intend " 'to have two systems of redress' " for federal employees (*Patterson*, 359 U.S. at 496 (quoting *Johansen*, 343 U.S. at 439)). Accordingly, federal employees who are eligible for compensation under the FECA should not be analogized to employees who may sue the United States.

[10] Petitioner cites (Pet. 11-12) three *district* court decisions (one of which was reversed) that disagreed with the result reached by the

tioner primarily argues (Pet. 14-23) that review by this Court is warranted on account of a conflict on another question. That disagreement involves the availability and theory of federal employees' suits against *private* vessels on which they are injured. While there is a difference of view between the Fifth and Ninth Circuits on that question, the issue is not presented here. Mr. Press was injured by exposure to asbestos on vessels owned by the United States, and nothing in the decision of the court below implicitly resolves that issue.

In *Aparicio* v. *Swan Lake*, 643 F.2d 1109 (1981), the Fifth Circuit concluded that federal employees may bring common law unseaworthiness actions of the sort described in *Sieracki* against private vessels. The court reached that conclusion despite the 1972 enactment of Section 905(b), which, in the case of private longshore and harbor workers, replaced the unseaworthiness action with a statutory negligence action. The court concluded that Section 905(b) was not intended to have effect beyond the coverage of the LHWCA (643 F.2d at 1116), so that workers not covered by the LHWCA—such as federal employees, who are exempted from its coverage by Section 903(b)—were not affected by the amendment. The Ninth Circuit, in contrast, held in *Normile* v. *Maritime Co.*, 643 F.2d 1380, 1383 (1981), that Congress intended the 1972 amendment to eliminate the unseaworthiness remedy not just for workers covered by the LHWCA, "but for other longshoremen whose rights were judicially created." However, that court stated that federal employees could bring negligence actions against private vessels.[11]

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court below. That sort of disagreement does not, of course, warrant review by this Court.

[11] The Ninth Circuit stated in a footnote in *Normile* that its conclusion did not leave the plaintiff without a remedy, citing the FECA

The decision below does not indicate whether the Third Circuit would conclude that federal employees who can establish admiralty jurisdiction may bring unseaworthiness actions against private vessels. Nor, contrary to petitioner (Pet. 21), did the decision below conclude that federal longshore and harbor workers have no claims at all against private vessels.[12] There is no warrant to review this case to resolve either issue.

3. Petitioner also argues (Pet. 23-28) that the court below erred in taking Section 903(b) of the LHWCA and Section 8116(c) of the FECA into account in making the FTCA-mandated determination whether "a private individual under like circumstances" (28 U.S.C. 2674) would be liable. In petitioner's view, those bars to government liability should be ignored, and the question should simply be asked whether a private shipyard owner without such statutory protections would be liable.[13] But the FTCA

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and adding that the plaintiff could "recover from defendant under the Longshoremen's Act upon a showing of negligence" (643 F.2d at 1382 n.2). That latter reference to the LHWCA remedy appears to be erroneous, in light of Section 903(b). However, it may be that federal longshore and harbor workers may pursue the common law negligence action that was relied upon prior to *Sieracki*.

[12] It may be that the court below would conclude that federal longshore and harbor workers may pursue either a common law negligence action or an unseaworthiness action against private vessels, since Section 903(b) does not specifically bar such claims. Even though a federal employee may pursue such an action against a private shipyard owner, it does not follow that he could pursue such an action against the United States, in light of the exclusivity provision in the FECA (see Pet. App. 11a n.8).

[13] The theory upon which petitioner rests its case—that under *Jones & Laughlin* private shipyard owners are subject to suit by their employees under Section 905(b) in their capacity as vessel owner—will not recur in the future because Congress has amended Section 905(b) to bar such "dual capacity" suits. See note 3, *supra*. Although the

refers to the liability of private parties "under like circumstances," and immunity to direct suit by the underlying plaintiff is a circumstance which should not be ignored.

Contrary to petitioner's assertion (Pet. 26-27), that conclusion does not conflict with the law of the Ninth Circuit. The decisions of that court demonstrate that the absence of direct tort liability is a relevant circumstance in determining potential third-party liability under the FTCA. The Ninth Circuit recognized in *United Airlines, Inc.* v. *Wiener,* 335 F.2d 379, 403-404, cert. dismissed, 379 U.S. 951 (1964), that an airline could not recover tort indemnification from the United States for payments made by the airline to plaintiffs who were government employees. It reached that result notwithstanding the conclusion that the FECA did not *itself* bar such recovery, because applicable state law barred recovery against those not liable in tort to the underlying plaintiffs. Accord *Wien Alaska Airlines, Inc.* v. *United States,* 375 F.2d 736 (9th Cir.), cert. denied, 389 U.S. 940 (1967); *Adams* v. *General Dynamics Corp.,* 535 F.2d 489 (9th Cir. 1976), cert. denied, 432 U.S. 905 (1977).

The cases cited by petitioner, *LaBarge* v. *Mariposa County,* 798 F.2d 364, 367 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), and *Bell Helicopters* v. *United States,* 833 F.2d 1375, 1378 (9th Cir. 1987), are not to the contrary. As petitioner notes (Pet. 26 n.14), the result in both cases, like the result here, was to *bar* the third-party claim against the government. Those cases differ from this only in that the government's immunity from direct suit

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amendment does not govern this case or the other asbestos cases pending at the time the amendment was enacted, the fact that the argument that petitioner makes has no prospective applicability further diminishes the need for review.

was mirrored almost perfectly in the immunity of a private employer under the worker's compensation bar. For that reason, they did not raise the issue presented here of whether the FTCA mandates consideration of a distinct legal bar to liability of the United States—here Section 903(b)—which is not mirrored in any parallel provision applicable to a private party.[14]

Significantly, in both cases the Ninth Circuit recognized that the basic thrust of the governing substantive law must control. The FTCA does not instruct a court to disregard immunities uniquely applicable to the United States on the ground that no such immunity could apply to a private party. In *LaBarge,* the court stated: "[T]he statutory language [of the FTCA] refers not to private persons under 'the same circumstances,' but to those under *similar* circumstances. * * * Because the federal government could never be exactly like a private actor, a court's job in applying the standard [for liability under the FTCA] is to find the most reasonable analogy." 798 F.2d at 367 (emphasis in original). Virtually identical language is found in *Bell,* 833 F.2d at 1378.[15]

Petitioner's argument (Pet. 27) that the court of appeals' approach is inconsistent with this Court's decision in *Lockheed* is without merit. *Lockheed* simply held that the FECA *itself* did not bar third-party tort actions arising out

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[14] Of course, even if no such consideration is appropriate under the FTCA, the First Circuit's alternative approach to the question presented, limiting Section 905(b) actions to cases in admiralty, see pages 3-4, *supra*, would lead to dismissal of petitioner's third-party claims here.

[15] Similarly, the Fourth Circuit, in *General Electric Co.* v. *United States*, 813 F.2d 1273, 1275 n.1, 1276 n.2 (1987), vacated and remanded on other grounds, No. 86-2015 (Jan. 19, 1988), noted that the FTCA "uses the term 'like circumstances,' rather than 'the same' or 'identical,' circumstances."

of injuries to federal employees. The Court explained that "the governing substantive law" would determine whether the government's immunity from direct suit would result in dismissal of FTCA third-party tort actions based on underlying suits by FECA-covered plaintiffs (460 U.S. at 199). Thus, where the governing substantive law permits third-party tort suits against those parties who are immune to direct suits by the underlying plaintiffs, third-party FTCA suits may proceed. See *e.g., Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597 (1963) (in a case arising out of a maritime collision under the old divided damages rule, contribution against the United States would be permitted because immunity to direct suit was irrelevant to such cases); *Doyle* v. *Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382 (1984) (under Illinois law, immunity of employer from direct suit does not immunize it from third-party tort suits). But the LHWCA and Pennsylvania law, the governing substantive law here, preclude third-party suits against parties immune from direct suits. See note 5, *supra* (LHWCA), and Pet. App. 63a (Pennsylvania law). In cases, like this one, in which the law applicable to private parties includes the rule that immunity of an employer to direct suit immunizes the employer from third-party tort suits, third-party FTCA claims based on injuries to federal employees—who are denied a direct cause of action against the United States—must be dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 88-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF PETITIONER EAGLE-PICHER INDUSTRIES, INC., TO OPPOSITION OF UNITED STATES

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The United States opposes Eagle-Picher's petition for certiorari on the grounds that (i) although the Third Circuit's *ratio decidendi* may be in conflict with prior decisions of the Fifth and Ninth Circuits, its outcome on the narrow facts of this case does not create an inter-circuit conflict; and (ii) the Third Circuit's "alternative" ground of decision—asserted solely in one footnote[1] to its opinion—would cause no inter-

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[1] Pet. App. 11a, fn. 8: "Nevertheless we agree that our decision could have been based on the more indirect rationale

circuit conflicts to arise and is sufficient to sustain its decision. The government does not, however, minimize the importance of the decision or of the federal questions presented.

ARGUMENT

Eagle-Picher submits that the case for grant of certiorari is compelling notwithstanding the government's arguments. The Third Circuit's principal underlying rationale for its decision is indefensible, and, if allowed to stand, will distort the law relating to federal maritime workers' rights for decades to come. Contrary to the government's arguments, the lower court's opinion *does* conflict[2] with the holdings of the Ninth Circuit in *Normile*[3] and the Fifth Circuit in *Aparicio*.[4]

1. In those cases, both the Ninth and the Fifth Circuits held that federally employed maritime workers retain valid rights of action for injuries caused

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advocated by the government." That rationale is that the government's absolute immunity to suit by one of its own employees under Section 8116(c) of the FECA is a relevant "circumstance" in determining the liability under the FTCA of the analogous "private individual under like circumstances." *See* p. 7, *infra*.

[2] Although the outcome in this case—denial of a third party's right to contribution for injuries to a federally-employed maritime worker—does not directly conflict with the outcomes of those decisions, that is only because the Fifth and Ninth Circuit decisions involved direct claims, not third-party claims for contribution and indemnity. But the basis for the lower court's holding, and the only reasoned justification for that outcome—that a federal employee would not have a right of action against a negligent vessel owner—does conflict.

[3] *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380 (9th Cir. 1981).

[4] *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981).

by vessel owners regardless of the fact that they are exempted from the Longshore and Harbor Workers Compensation Act ("LHWCA") for *compensation* purposes. By contrast, the Third Circuit in this case relied *solely* on the exclusion by Section 903(b) of the LHWCA of federal workers from LHWCA coverage to support its conclusion that Eagle-Picher could not state a valid third-party claim for contribution and indemnity. Pet. App. 15a. The Court reasoned that, if the underlying injured worker did not have a valid cause of action against a vessel-owner, then Eagle-Picher could not have a valid third-party action either, because the underlying substantive law (according to the court, the law of Pennsylvania) did not allow third-party recovery in the absence of common liability.

The lower court found that Eagle-Picher did not state a valid third-party claim only because it concluded that Mr. Press could not have stated a valid direct claim. And it found Mr. Press disabled from stating a direct claim *not* because of Section 8116(c) of FECA, but because he was excluded from coverage by the LHWCA.[5] The Third Circuit's *ratio decidendi*

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[5] Eagle-Picher submits that a proper analysis does not require any reference to a *federal* employee's peculiar rights or liabilities under the LHWCA or any other statute. The FTCA requires that the government's liability for third-party tort claims be measured by reference to that of a "private individual under like circumstances"—that is, a private shipyard employer who would be subject to suit for vessel-owner negligence even by one of his own employees under *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Contrary to the government's argument that the need for *certiorari* is diminished because Section 905(b) has been amended prospectively to eliminate "dual-capacity" suits, the need for

did not in any way depend on the status of the United States as the employer of the maritime worker or as the owner of the vessel on which he worked and where he was injured. Contrary to the government's characterization, the § 903(b) exclusion applies equally to federal employees whether they are injured by a United States-owned vessel or a privately-owned vessel. The logic of the Third Circuit's opinion depends entirely on the mistaken conclusion—in conflict with the holdings of the Fifth and Ninth Circuits—that a federal employee, because exempted from LHWCA coverage by § 903(b), is disabled from bringing a cause of action against any negligent vessel owner, regardless of the status of that vessel owner.

In its Opposition, the government speculates that "it may be that the Court below would conclude that federal longshore and harbor workers may pursue either a common-law negligence action or an unseaworthiness action against private vessels. . . ." Gov't Opp. at 10, n.12. However, if Mr. Press *could* have pursued either such action against a private vessel-owner, then Eagle-Picher would *not* be disabled from pursuing a third-party action against the government under the FTCA, because the FTCA requires that the government be held liable for tort claims to the same extent as a "private individual under like circumstances," and a private individual under like circumstances would be subject to third-party liability. Thus, if the Court below were to conclude as the govern-

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certiorari remains acute because the underlying question—the proper interpretation and application of the FTCA to third-party suit where the government enjoys a unique immunity to direct suit—is unresolved.

ment speculates, then it would have to reverse its holding denying Eagle-Picher's third-party claim.

2. The government's brief in opposition confuses the issues presented here by arguing that three courts of appeals are united in disallowing third-party claims against the government where the underlying injured party is a federal maritime employee. All three decisions—in contrast to the four consistent and logically concordant district court decisions cited by Eagle-Picher in its certiorari petition at 12—are in disagreement as to the putative basis for denying such claims. Although the Federal Circuit has recently denied a similar third-party cause of action (in a decision issued after Eagle-Picher's petition for certiorari was filed), *see Lopez v. A.C.& S, Inc.*, 858 F.2d 712 (Fed. Cir. 1988), it never even cited the Third Circuit opinion for which certiorari is requested here. Instead, the *Lopez* court apparently relied on a misguided interpretation of the First Circuit's rationale in *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986). That rationale—mistakenly injecting an independent, additional "maritime nexus" requirement into Section 905(b) of the LHWCA—was expressly rejected by the district court in this case, and formed the basis for one of the questions certified for interlocutory appeal, a question that the court of appeals never answered. (Instead, the court went off on the § 903(b) tangent.)

Contrary to the government's argument (Gov't Opp. at 7), moreover, the lower court's holding that admiralty jurisdiction does not exist over a shipyard employee's claim for asbestos-related injuries against a land-based manufacturer—a holding on which all the

courts of appeals that have addressed the issue concur—is not an alternate basis for upholding the denial of Eagle-Picher's third-party claim here. Whether or not admiralty jurisdiction exists over the injured maritime worker's claim for product liability against a land-based manufacturer is irrelevant to the question whether admiralty jurisdiction exists over *Eagle-Picher*'s claim for third-party contribution for negligence of the vessel, a claim determined under the standards of *Scindia Steam Navigation Co. v. DeLos Santos*, 451 U.S. 156 (1981), not under product-liability principles.

The First Circuit's holding in *In re All Maine* has been rejected by two district courts that have subsequently examined it, including the district court in this case,[6] and that decision was left unreviewed by the court of appeals here.

3. Had the government opposed Eagle-Picher's certiorari petition on the ground that, although the Third Circuit was mistaken in its rationale, its decision was nonetheless correct, and therefore not worthy of certiorari, the government's position would at least have been somewhat more understandable. However, the government has argued both that the "reasoning relied upon by the court below . . . is . . . correct" (Gov't. Opp. at 8), and that the footnote reference in the Court's holding to the exclusive-liability provision of the FECA also states a valid basis for its decision. However, to the extent that the gov-

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[6]In addition to District Court Judge Pollak's decision in this case, the decision of Judge Tashima *In re All* [*Hawaii*] *Asbestos Cases*, "Memorandum Order Re Reconsideration and Certification," Nos. 79-0382, *et al.* (D. Hawaii, Dec. 23, 1986), also expressly considered and rejected the First Circuit's rationale.

ernment appears to rely on the Court's footnote reference to Section 8116(c) of the FECA, the decision undeniably raises important federal questions as to the interpretation and interaction of the FECA, the FTCA, and the LHWCA. If the Court's opinion depends on whether the *legal* circumstance (peculiar to the government) of FECA-based immunity to suit by federal employees is a relevant "like circumstance" in analogizing the United States to a "private individual under like circumstances" for purposes of tort liability under the FTCA, it then raises the very important and unsettled question of whether the FTCA requires analogizing the United States to a private individual under like *legal* circumstances or to a private individual under like *factual* circumstances. To the extent that the Third Circuit purported to resolve this issue, it did so in direct conflict with the Ninth Circuit's recent decisions in *Bell Helicopters v. United States*[7] and *LaBarge v. Mariposa County*.[8] Both cases held that a third party's right to contribution in tort from the United States depends on whether an analogous private party, subject to the like *factual* circumstance of coverage under state workers' compensation statutes, would be subject to third-party liability, *not* on whether a nonexistent fictitious entity that shares one and only one *legal* circumstance with the United States—its special immunity under Section 8116(c) of the FECA—would be subject to third-party liability.[9]

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[7] 833 F.2d 1375 (9th Cir. 1987).

[8] 798 F.2d 364 (9th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987).

[9] The government misplaces its reliance on *United Airlines*,

As Eagle-Picher has consistently argued, the issue is whether the United States should be immune from third-party liability even where a private individual in like circumstances—a private shipyard employer/vessel-owner—would *not* be so immune.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 15, 1988

Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert denied*, 379 U.S. 951 (1969), *Wien Alaska Airlines, Inc. v. United States*, 375 F.2d 736 (9th Cir.), *cert. denied* 389 U.S. 940 (1967), and *Adams v. General Dynamics Corp.*, 535 F.2d 489 (9th Cir. 1976), *cert. denied*, 432 U.S. 905 (1977), to attempt to square Ninth Circuit precedent with the lower court's "alternative rationale." None of those cases involved the possibility of tort liability under a dual capacity doctrine, such as the vessel-owner liability affirmed in *Jones & Laughlin*. Thus, the courts in those cases never confronted the issue whether the proper analogous private party under the FTCA was an employer subject to state workers' compensation statutes or a fictitious "private individual" subject to the exclusive liability provision of the FECA. Since, in those cases, even a *private* party would not have been liable for third-party contribution in tort, the question of the proper analogy under the FTCA never arose.